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In The

Supreme Court of the United States

October Term, 1995

AIR COURIER CONFERENCE OF AMERICA/
INTERNATIONAL COMMITTEE,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are two conflicts among circuits involving the *Chevron* test for deference to agency statutory interpretations: first, a conflict in principle over whether the court may presume a broad delegation of rulemaking authority to the agency, absent express withholding of such authority; and second, a direct conflict over whether the court may consider legislative history in *Chevron* step one. The circuits also conflict over the primary purpose of the Postal Reorganization Act (PRA). The Third Circuit: (1) presumed a broad delegation of rulemaking authority to the United States Postal Service to abandon published "rates" and "classes" of mail required by the PRA in favor of privately negotiated prices for customized services; (2) considered the legislative history of the PRA without first considering the plain meaning of its anti-discrimination provisions; and (3) misconstrued the legislative intent by deferring to the Postal Service's commercial motives. The questions presented are:

1. Whether the PRA delegates to the Postal Service legislative rulemaking authority to issue the International Customized Mail (ICM) rule permitting the Postal Service to abandon published "rates" and "classes" of mail.

2. Did the court below err by first considering the legislative history of the PRA and then applying a misconstrued legislative intent giving deference to the Postal Service's commercial motives to impeach the plain meaning of PRA provisions prohibiting rate discrimination?

LIST OF PARTIES

In addition to the parties named in the caption, the parties below included UPS Worldwide Forwarding, Inc. The Air Courier Conference of America/International Committee is a part of the Air Courier Conference of America, a trade association with approximately 110 members.

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The Air Courier Conference of America/International Committee (ACCA), intervenor below, petitions the Court to issue a writ of certiorari to the Court of Appeals for the Third Circuit which reversed summary judgment permanently enjoining the United States Postal Service from offering individually negotiated and priced contracts for international business mail services.

OPINIONS BELOW

1. *UPS Worldwide Forwarding, Inc. v. United States Postal Service, Air Courier Conference of America/International Committee, Intervenor*, 66 F.3d 621 (3d Cir. 1995), Appendix (App.) 1a to 43a.

2. *UPS Worldwide Forwarding, Inc. v. United States Postal Service*, 853 F. Supp. 800 (D. Del. 1994), App. 44a to 59a.

3. International Customized Mail Service: Final Rule, United States Postal Service, 58 Fed. Reg. 29778 (1993), App. 60a to 83a.

JURISDICTION

The court of appeals entered its judgment on September 15, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Air Courier Conference of America/International Committee (ACCA) was a party below. *See* district court opinion granting ACCA's motion to intervene (May 16, 1994), App. 56a to 59a, and court of appeals opinion affirming ACCA's standing to intervene (September 15, 1995), App. 24a n.12.

RELEVANT STATUTES AND REGULATIONS

The text of the International Customized Mail Regulation, 58 Fed. Reg. 29778 (1993), is found at Appendix 80a to 83a. Relevant statutes are set forth below.

Title 39 U.S.C.:

§ 101(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

§ 401 The Postal Service shall have the following general powers:

* * *

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

* * *

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

§ 403 (a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service —

* * *

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

* * *

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination

among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

§ 404 (a) Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

* * *

(2) to prescribe, in accordance with this title, the amount of postage and the manner in which it is to be paid. . . .

§ 407(a) The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries. The decisions of the Postal Service construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be conclusive upon all officers of the Government of the United States.

STATEMENT OF THE CASE

This case presents three conflicts among the circuits concerning statutory construction by administrative agencies and one important policy question that the Court should clarify as to the type of agency and rule to which the courts should defer. The first conflict concerns a conflict in principle over when to apply the *Chevron* two-step test of deference to any agency's construction. The second is a direct conflict in how to apply step one of *Chevron* to determine the plain meaning of a statute. The third presents a direct conflict between circuits over the legislative purpose of the Postal Reorganization Act of 1970. Fourth, this case presents the issue of whether the courts should defer to the Postal Service's commercially motivated rules.

The Air Courier Conference of America (ACCA) is the trade association of the expedited delivery industry. Its International Committee includes over 20 members

from large companies like DHL Express Worldwide, Inc., Federal Express Corporation and UPS Worldwide Forwarding, Inc., to smaller niche market and start-up competitors, who operate internationally. ACCA members have invested substantial resources to develop their international operations and are concerned that, unless the Third Circuit's decision below is reversed, the Postal Service's rule and service at issue will cause competitive and financial harm to a $5 billion industry vital to the competitiveness of American firms involved in international trade.

The underlying dispute involves the Postal Service's efforts to minimize the protection afforded its competitors by the Postal Reorganization Act (PRA), 39 U.S.C. §§ 101-5605 (1988), in competitive markets while maintaining its domestic monopoly under the Private Express Statutes (PES), 18 U.S.C. §§ 1693-1699 (1994), 39 U.S.C. §§ 601-606 (1988). For over 200 years, postal rates in the United States have universally been set on the public utility model of published rates and classes of mail applicable to all customers. In 1992 the Postal Service published an interim International Customized Mail (ICM) rule which nullified the requirement to publish rates and classes for certain international business mail services in order to attract large customers from private sector courier companies, such as ACCA members. The Postal Service issued the ICM rule to allow itself to negotiate contracts with individual customers for a customized mix of up to three types of international mail services at privately negotiated prices.

The District Court for the District of Delaware held that the ICM rule violated the PRA and enjoined its implementation. The Court of Appeals for the Third Circuit reversed. The court of appeals held that market conditions and the Postal Service's business judgment justified abandonment of published rates. The decision is at odds with the plain meaning of certain PRA provisions and the statutory scheme as a whole. The court erred by

never considering the plain meaning of the PRA independently of the legislative history it misconstrued. This Court has considered and rejected agency abandonment of statutory, published rate requirements in two other industries. There is all the more reason to reject it here, where the Postal Service is both the rulemaker and the competitor who benefits from the rule in the marketplace. If the Postal Service is to be relieved of its published rate obligations, thereby nullifying protection of competitors from predatory pricing, it is up to Congress, not the Postal Service and the courts, to do so.

PROCEEDINGS BELOW

1. Predecessor Cases

This case follows *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991) (*ACCA I*), and *Air Courier Conference of America/ International Committee v. United States Postal Service*, 959 F.2d 1213 (3d Cir. 1992) (*ACCA II*). In *ACCA I*, this Court: (1) granted ACCA's petition for certiorari, over the Postal Service's opposition, to review the District of Columbia Circuit's decision jeopardizing a Postal Service rule allowing competition from international remail, *see Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 803 (1990) (mem.); (2) rejected as untimely the Postal Service's argument that its rules are exempt from judicial review, 498 U.S. at 522-523; and (3) held that postal employees' unions lacked standing to enforce the Private Express Statutes. In *ACCA II*, the Court of Appeals for the Third Circuit held that the PRA did not require the Postal Service to submit its published rates for international mail services for approval by the Postal Rate Commission.

2. Administrative Proceeding

On July 10, 1992, four months after the Third Circuit decision in *ACCA II*, the Postal Service announced the

immediate implementation of its International Customized Mail (ICM) rule granting itself the authority to market and price international mail services in a new way, unique in the 200-year history of the Post Office Department and its Postal Service successor. 57 Fed. Reg. 30651 (1992). Rather than publish rates for a class of service applicable to all qualified mailers, as the Postal Service had always done, under the ICM rule the Postal Service would negotiate a bundled mix of international postal services at customer-specific contract prices with large mailers under no obligation to meet minimum mailing requirements. "An ICM mailing may include items from any or all of the three classes of international mail . . . : Postal Union Mail, Parcel Post, and Express Mail International Service" without generally applicable requirements except format specifications and size and weight limits. *Id.* at 30653. Each of those services is individually the subject of published rates and classifications in the International Mail Manual (IMM). *See, e.g.*, IMM, Issue 15 (July 9, 1995) (Individual Country Listings). The Postal Service justified ICM "international service on the ground that it was responding to increased competition from 'private sector alternatives' in the hard copy communications and parcel marketplace," in general, and in the "bulk and expedited services" market, in particular. 57 Fed. Reg. at 30652.

On August 10, 1992 ACCA filed comments on behalf of the expedited delivery industry opposing the ICM rule on the grounds that: (1) the Postal Service had failed to cite any PRA provision which expressly confers statutory authority to negotiate individual prices; (2) contract prices violate the PRA's statutory scheme; (3) ICM will facilitate cross-subsidies and predatory pricing of international services by the Postal Service; and (4) ICM will lead to costly piecemeal litigation to discover and challenge the Postal Service's anticompetitive pricing.

On May 24, 1993, the Postal Service published a final rule permanently adopting the interim ICM rule. *See* App.

60a to 83a. The Postal Service's final rule claimed authority for the ICM rule under the contracting provision of 39 U.S.C. § 401(3),[1] its authority to establish international rates under § 407(a), the incidental powers clause of § 401(10), and the discount rate provision of Article 20.15 of the Universal Postal Union Convention (UPU). The Postal Service argued that the incidental powers provision eliminated the need for specific statutory authority because the statute did not expressly prohibit contract pricing. App. 63a. The Postal Service also invited competitors to challenge ICM prices "just like they can seek judicial review of other international rates." App. 79a.

3. Judicial Proceedings

a. District Court

On July 22, 1993, UPS Worldwide Forwarding, Inc. (UPS) filed suit in the District Court for the District of Delaware seeking a permanent injunction restraining the Postal Service from entering ICM agreements and rendering ICM service. UPS Complaint at 9, ¶ 1, 853 F. Supp. 800 (D.Del. 1994) (No.93-340-JLL). The district courts have original jurisdiction over suits against the Postal Service under 39 U.S.C. § 409 (1988) and 28 U.S.C. § 1339 (1988). Notwithstanding the final rule's invitation to competitors to challenge ICM rates in court, on September 20, 1993, the Postal Service moved to dismiss claiming that UPS lacked standing to sue for failure to plead injury in fact. On October 19, 1993, ACCA moved to intervene as a plaintiff and filed a complaint pleading actual injury to a member who lost an account to the Postal Service's ICM program. ACCA Complaint ¶ 3.

The district court heard the case on cross-motions: the Postal Service's motion to dismiss for lack of standing and failure to state a claim, which ACCA opposed, and

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[1] All section citations herein are to Title 39, unless otherwise specified.

UPS's motion for summary judgment, which ACCA supported. On both motions, ACCA challenged the Postal Service's claimed authority for contract pricing under the provisions it advanced upon publication of the final rule. ACCA contended that the failure of these provisions to delegate rulemaking authority for negotiated pricing makes it unnecessary to establish any specific statutory prohibition and that the Postal Service's commercial self-interest in the ICM program precluded deference to its statutory interpretation.

On May 16, 1994, the district court held that UPS had standing (App. 50a) and granted ACCA's motion to intervene (App. 58a). The district court did not address the delegation issue, but held that ICM violated PRA section 403(b)(2), which requires the establishment of mail categories (App. 51a); section 403(c), which prohibits undue or unreasonably discriminatory rates (App. 52a); section 101(d), which requires fair apportionment of costs (App. 53a); and section 407(a), which requires the Postal Service to obtain presidential approval for international rates (App. 55a). The court entered a permanent injunction barring the Postal Service from implementing the ICM program. App. 58a-59a. The Postal Service appealed.

b. Court of Appeals

On September 15, 1995, the Third Circuit upheld UPS's standing to sue and ACCA's standing to intervene (App. 24a & n.12) and reversed on the merits (App. 43a). Although ACCA briefed the delegation of authority issue, the court of appeals did not consider whether the PRA affirmatively delegated authority for the Postal Service to abandon 200 years of published rates. The court, defining the sole issue on the merits as whether ICM service violated several provisions of the PRA, reversed. App. 24a.

The court prefaced its consideration of the merits with a selective review of 200 years of statutory and regulatory history and the legislative history of the PRA.

It concluded that the Postal Service is essentially an unregulated "business" when it operates in international markets. Specifically, the court noted that: (1) the 1970 PRA "represented 'a dramatic break with the past' " (App. 7a); (2) that in 1970 Congress intended to "launch[] the Postal Service into the commercial world" (*id.*) (internal punctuation omitted); and (3) though the PRA retained the "monopoly over the carriage of letters in and from the United States," the Postal Service has suspended its monopoly over "extremely urgent letters" and "international remailing" (App. 8a & n.4) (internal punctuation omitted). On those bases, the court concluded that "a primary purpose underlying the PRA was to require the Postal Service to [adopt] . . . modern business practices" (App. 30a to 31a), "to operate . . . more like a business" (App. 40a), to conduct itself "in a businesslike way" (App. 41a), and to seek "innovation" and "new markets" (*id.*).

After elevating the legislative history's references to "business" and "businesslike" to the status of primary legislative purpose, the court of appeals denigrated the PRA sections the district court found the ICM rule to violate. The court, finding "no specific criteria" for international rate setting (App. 25a), disparaged the PRA's anti-discrimination provisions as "general statements of policy, duties and powers" (App. 28a), "list[ing] the '[g]eneral duties' " (App. 29a), " '[g]eneral duties' " (App. 34a), "merely enumerat[ing] . . . the Service's '[g]eneral duties'" (App. 36a), and "intended to list '[g]eneral duties' " (*id.*).

The court of appeals was then persuaded by four business justifications for the ICM rule. Because the district court disposed of the case as a matter of law on cross-motions and because one of the "facts" the court of appeals found so persuasive was first presented by Postal Service counsel on appeal, none of the four following justifications was tested by discovery or the subject of district court findings:

First, the court credited the Postal Service's contention that it needed contract pricing to respond to variations in the way other countries charge the Postal Service to deliver U.S. origin mail. Such variations resulted in Postal Service rates that did not reflect costs for some large customers. App. 26a to 27a. (The record contains no explanation of why the Postal Service cannot account for country-by-country cost variations by country-specific, rather than customer-specific, rates).

Second, the court relied upon the Postal Service's argument that increasing competition from private sector companies with flexible rate structures "made it increasingly difficult for the Postal Service to [attract] . . . customers using a single published schedule of rates." App. 27a. (Given the procedural posture of the case, neither the district court nor the Third Circuit could consider (a) other possible reasons for the Postal Service's difficulties such as inferior service quality or (b) its advantages over the private sector: it pays no federal, state or local income or property taxes, borrows funds at below market rates from the U.S. Treasury, maintains a $9 billion negative net worth, and has a $40 billion dollar protected market.) *See also infra* pp. 26-27.

Third, the court found further justification in the Postal Service's admission that it "[e]stimated substantial costs to negotiate and implement the ICM agreements; expenses were high enough so that 'for all but the largest volume customers, those costs in many instances could be greater' than what the Postal Service earned from the ICM program." App. 28a. (The record is silent concerning whether the Postal Service can determine in advance whether a particular transaction's cost will lead to revenues above or below its costs.)

Finally, the court found particularly convincing postal counsel's rebuttal statement at oral argument justifying the ICM program's feature of targeting large mailers without their commitment to tender any minimum amount of mail:

> To require commitment would just sort of drive [potential customers] off. I mean, if you say we are not giving you this business until you commit to it, then you never get the business.
>
> It is better to make them the offer, get them to try the business, and then in practice my client informs me, once you get the business of a big company, you tend to get all its business.

App. 30a.

The court looked at the broad statutory goal of making the Postal Service more businesslike and "[saw] nothing in the PRA that prevents the Postal Service from innovative attempts to increase its business and profits, as long as it stays within the bounds of the relevant statutes." App. 31a. Relying heavily on the Postal Service's explanations, the court held that:

1. The ICM program did not unfairly or inequitably allocate costs in violation of § 101(d), because whether a rate is "fair" or "equitable" is not capable of precise definition and ICM service "reflects a reasonable business decision about the most effective means to solicit new customers" (App. 31a);

2. The ICM program did not violate "§ 403(c)'s ban on 'undue or unreasonable discrimination' or . . . 'preferences' " because that too is "difficult to define" (App.32a) and the Postal Service had "valid reasons" to create ICM service (App. 34a);

3. The ICM program did not violate § 403(b)(2) because its ban on " 'undue or unreasonable' discrimination and preferences" does not require rate "uniformity or equality" (App. 35a), accepting the Postal Service's business judgment that ICM "may better 'meet the needs' of large-volume mailers" as a "category of [mail] users . . . by offering them individualized service plans at individual rates" (*id.*); and

4. The ICM program did not violate § 407 because, even if ICM contract prices are not "rates," they are

"other charges"[2] within its meaning (App. 37a); presidential consent is satisfied by failure to object (App. 39a); and the President (after suit was filed) published a statement in the Federal Register agreeing that "failure . . . to object . . . is consent" (App. 38a to 39a).

In short, the court concluded, the ICM rule was simply an appropriate response to the PRA's primary congressional purposes. App. 41a.

The Third Circuit made no attempt to analyze the plain meaning of the PRA provisions at issue and, in spite of its reliance upon the Postal Service's business judgment with respect to three of the four provisions at issue, the court concluded its opinion by noting that, while the Postal Service deserved a "reduced level of deference," the court did "not rely on any deference that might be due" the Postal Service under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). App. 43a. Moreover, although it found words in three of the PRA provisions difficult to define, the Third Circuit made no attempt to justify its incursion into the legislative history on the basis of any ambiguity in the provisions or gap in the statute.

REASONS FOR GRANTING WRIT

ACCA respectfully petitions the Court to grant the writ: (1) to resolve the conflict in principle among circuits whether a presumption of delegated power, absent an

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[2] The meaning of "other charges" was not briefed below, but may refer to "terminal dues" (what postal administrations pay each other for the difference in the mail volume they deliver for each other) and "conveyance fees" (what postal administrations charge each other for forwarding mail from one foreign country to another). *See* General Accounting Office, U.S. Postal Service – Unresolved Issues in the International Mail Market (Draft) (November, 1995) (other charges are segregated from rate revenues).

express withholding of such power from an agency, suffices to invoke *Chevron*; (2) to resolve the direct conflict among circuits concerning the proper scope of step one of the *Chevron* determination of statutory "plain meaning"; (3) to resolve the direct conflict in principle between circuits concerning the primary legislative intent of the PRA; and (4) to consider the recurring policy issue of whether the Postal Service's interpretations of the PRA warrant deference when they are driven by its commercial self-interests as a government-owned monopoly seeking to attract customers of private sector competitors in competitive markets.

I.

TO RESOLVE CONFLICT IN PRINCIPLE OVER PRESUMPTION OF RULEMAKING AUTHORITY

The Third Circuit limited its consideration of the merits to "the district court's holding that the Postal Service's promulgation of the regulation establishing the ICM service violated several provisions of the PRA." App. 24a. The court held that "ICM service does not contravene the PRA." App. 43a. In so doing, the court rejected, *sub silentio*, ACCA's contention that the issue on appeal, as framed by the Postal Service and ultimately adopted by the court of appeals, "begs the question of the source of [the Postal Service's] authority to negotiate ICM arrangements with individual mailers." Brief for Appellee ACCA at 11, *UPS Worldwide Forwarding, Inc. v. United States Postal Service*, 66 F.3d 621 (3d Cir. 1995) (No. 94-7423). The court thus "presumed" that the Postal Service had rulemaking authority that encompassed the ICM rule.

It is predictably difficult to find a majority opinion articulating such a presumption. However, dissents to Eighth and Ninth Circuit opinions have ascribed such a presumption to majority panels in *United States v. Wong*, 2 F.3d 927, 938 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2705

(1994) (Norris, J., dissenting) (majority made unwarranted inferences from silence; "legislative silence does not in itself constitute delegation of authority") and *Arkansas State Bank Commissioner v. Resolution Trust Corp.*, 911 F.2d 161, 179 (8th Cir. 1990) (Heaney, J., dissenting) (majority attempted to create a gap or an ambiguity where none exists; "no administrative agency can bootstrap itself into a position where it can by rule fill a gap or resolve an ambiguity where neither exists"). Such presumptions conflict with the law in the District of Columbia and other circuits.

The District of Columbia Circuit has held, *en banc*, that agency authority cannot be presumed in the absence of a specific prohibition to its exercise:

> [A]n agency's power is no greater than that delegated to it by Congress. . . . The [National Mediation] Board errs grossly in suggesting that "the question is whether the Act expressly precludes the Board from choosing" to adopt the Merger Procedures. . . . Quite to the contrary, the question is whether the Board's "exercise of quasi-legislative authority" is "rooted in a grant of such power by the Congress and subject to limitations which that body imposes."

Railway Labor Executives' Association v. National Mediation Board, 29 F.3d 655, 670 *(en banc) (RLEA), amended* 38 F.3d 1224 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 1392 (1995), *quoting, Lyng v. Payne*, 476 U.S. 926, 937 (1986) and *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (citations omitted). The D.C. Circuit recently reiterated its *RLEA* decision:

> Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

Oil, Chemical and Atomic Workers International Union, AFL-CIO v. National Labor Relations Board, 46 F.3d 82, 90 (D.C.

Cir. 1995), *cert. denied*, 116 S.Ct. 81 (1995) (Edwards, C.J.) *quoting RLEA*, 29 F.3d at 671 (emphasis in original); *accord, American Petroleum Institute v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions in a particular area.")

Whether a rulemaking agency must first establish its authority to act or the challengers must first establish an express withdrawal of such authority, has importance beyond the issue of whether the Postal Service has such authority here. The issue implicates whether and under what circumstances the courts need even begin their two step analysis under *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* presupposes "an exercise of delegated authority."[3] Even pre-*Chevron*, "[l]egislative rules were the product of a specific delegation of authority from Congress to an administrative agency to interpret a specific statutory term or fill in a statutory gap." *Merrill, supra* note 3, at 973.

Had the Third Circuit considered the delegation issue, it would not have found the threshold delegation. The PRA does not contain a "broadly worded authorization" of rulemaking authority. *ACCA II*, 959 F.2d at 1226 (Becker, J., concurring). Moreover, the Third Circuit's determination here that the PRA's primary purpose was to make the Postal Service "more businesslike" is antithetical to a delegation of any rulemaking authority.

Furthermore, in publishing the final ICM rule, the Postal Service responded to ACCA's comments by identifying three PRA provisions and one UPU provision upon which it based its delegated authority to issue the rule. It

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[3] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 987 (1992), citing Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).

advanced the same provisions before the courts. The provisions do not support the Postal Service's claim of delegated authority. First, § 401(3) confers only procurement contracting authority as it is limited to the Postal Service's "expenditures." *See generally, Peoples Gas, Light and Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1189 (7th Cir. 1981) (Postal Service's authorization for procurement expenditures governed by §§ 401(3) and 401(2)). Second, § 407 authorizes the Postal Service to negotiate postal agreements with foreign countries and to establish international rates. There is nothing in that section even remotely suggesting rulemaking authority or the authority to negotiate private contracts with domestic customers for international mail services. Third, § 401(10) cannot expand the Postal Service's rulemaking authority to cover ICM contracts because (a) § 401(10) is specifically limited to the Postal Service's exercise of "specific powers" under § 404; (b) § 404 does not include any rulemaking authority; and (c) the only reference to postage rates in § 404(a)(2) requires that it be prescribed "in accordance with this title." Fourth, UPU[4] Article 20.15 authorizes volume discounted rates, not individually negotiated prices and has no force of U.S. law.

None of the provisions upon which the Postal Service relies confers authority to issue rules that depart from the requirement of published rates reflected in the plain meaning of the PRA or to enter customer-specific contracts at privately negotiated prices for customized services. The Third Circuit erred by presuming such authority in conflict with the District of Columbia Circuit.

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[4] The Universal Postal Union is an international organization of postal administrations which, contrary to the court of appeals determination (App. 32a n. 13), disclaims any regulatory authority over private sector expedited delivery firms. *See* UPU, Comments on the Views of Private Operators on the Subject of Reforms in the UPU Acts, Private Operators-UPU Contact Committee (October 18, 1993).

II.

TO RESOLVE DIRECT CONFLICT OVER SCOPE OF *CHEVRON* STEP ONE

On review of agency actions, *Chevron* requires a two-step review of an agency's construction of a statute it administers. In step one, courts must determine whether Congress has directly spoken to the precise issue. If the intent of Congress is clear, that is the end of the matter. If the statute is silent or ambiguous with respect to the specific issue, the court must go to step two to determine whether the agency's answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843.

A conflict exists among the circuits over the proper scope of *Chevron* step one. May the court consider legislative history in step one without first concluding that the statute is silent or ambiguous, as the Third Circuit did here? Or is the consideration of the legislative history the exclusive province of step two, as the Sixth, Seventh and District of Columbia Circuits have held and some of this Court's decisions have suggested?

The court of appeals considered the legislative history of the PRA first and the PRA provisions that the district court held the ICM rule to violate second. It never considered the plain meaning of the anti-discrimination provisions or the statute as a whole. The court of appeals decision can be viewed in two ways. It either expanded the scope of *Chevron* step one to include incursion into the legislative history, properly deferred until step two, or it reversed the sequence of the two *Chevron* steps. In either case, the effect was to misuse the legislative history to "impeach" the plain meaning of the anti-discrimination provisions of the PRA. Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L.J. 511, 521 (1989).

Specifically, in step one, the court considered the legislative history of the PRA, finding a legislative purpose that gave primacy to the Postal Service's commercial goals. In step two, the court found that the imprecise

standards of what it considered unimportant PRA provisions were somehow superseded by the Postal Service's commercial considerations that it considered consistent with the legislative intent. Therefore, the court concluded, the Postal Service's interpretation of the statute was reasonable, even without reliance upon the "reduced level of deference" purportedly due the Postal Service under *Chevron*.[5] App. 43a. The court of appeals' consideration of the legislative history first, and the meaning of the statute second, aligns it with other circuits which have either held or adopted a methodology showing that, post-*Chevron*, the courts may consider both Congressional intent and plain meaning of the statute in *Chevron* step one. *See, e.g., Doyle v. Shalala*, 62 F.3d 740, 745 (5th Cir. 1995); *Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir. 1995); *Alaska v. Babbitt*, 54 F.3d 549, 552 (9th Cir. 1995); *Schering Corp. v. Food and Drug Administration*, 51 F.3d 390, 398 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 274 (1995).

In *Utah*, the Tenth Circuit construed step one of *Chevron* to allow consideration of the legislative history to determine Congressional intent:

> In determining the meaning of a statute, we look at not only the statute itself but also at the larger statutory context. We may ascertain the intent of Congress through statutory language and legislative history. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.

Utah, 53 F.3d at 1148 (citations and internal punctuation omitted).

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[5] Merrill interprets the Supreme Court's recent decisions to have replaced the sliding scale of variable deference with a binary, "all-or-nothing" determination of the deference issue. Merrill, *supra* note 3, at 977.

The Fifth, Third, Ninth and Tenth Circuits' so-called "intentionalist" approach is in direct conflict with the District of Columbia, Sixth, and Seventh Circuits' "textualist" approach.[6] The textualist circuits hold that plain meaning must, in the first instance, be determined from the text of the statute and that consideration of legislative history is appropriate only at step two of the *Chevron* inquiry:

> First and foremost, of course, *Chevron* instructs that unless the statute's provisions are ambiguous, we are simply to give effect to the unambiguously expressed intent of Congress. The reason for this requirement is obvious: through excursion into legislative history, a writer can find support for virtually any position.

Jewish Hospital, Inc. v. Secretary of Health and Human Services, 19 F.3d 270, 274 (6th Cir. 1994), *quoting Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 818 (6th Cir. 1993) (Batchelder, J., dissenting) (citations omitted); *accord Castellon-Contreras v. Immigration and Naturalization Service*, 45 F.3d 149, 153 (7th Cir. 1995) (plain language of statute is conclusive of congressional intent, except in rare cases where plain language would: (1) produce results demonstrably at odds with the drafters' intent, (2) lead to an absurd result, or (3) thwart the purpose of the overall statutory scheme); *see Oil, Chemical and Atomic Workers Intern. Union*, 46 F.3d at 90 (under *Chevron*, "absent *plain meaning* in a statute" courts defer to reasonable agency interpretation) (emphasis in original).

The First Circuit noted the conflict in *Strickland v. Commissioner of Maine Department of Human Resources*, 48 F.3d 12, 16-17 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 145 (1995). That court found that "it remains unclear whether,

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[6] Merrill, *supra* note 3, at 991. Michael Herz, *Judicial Textualism Meets Congressional Management: A Potential Collision in Clean Air Interpretation*, 16 Harv. Econ. L. Rev. 175, 198-200 (1992).

and if so, to what extent, a court engaged in the first stage of a *Chevron* inquiry may use other tools of statutory construction, such as legislative history." *Id.*

This Court has suggested a resolution but has not specifically resolved the conflict. In cases beginning with *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), it has placed greater emphasis in step one of the *Chevron* test on the plain meaning of the statute and appears to have limited the consideration of legislative history: "the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole" (citations omitted). The court has shifted step one from the "specific intentions" rubric of the intentionalist school to the "plain meaning" rubric of the textualist school. Merrill, *supra* note 3, at 991. Only if that examination had resulted in a determination that the specific provisions were either ambiguous or left a gap that Congress specifically intended the Postal Service to fill, would there have been any need for the court of appeals to go on to step two for a consideration of the legislative history.[7] Recently, in *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1593-94 (1994), the Court held that the most reliable guide for reconciling diverse statutory purposes is the enacted text.

The textualist circuits hold and the *K Mart* and *Chicago* decisions suggest that the Third Circuit should have

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[7] Justice Stevens suggests five canons of statutory construction for the five acts of Shakespeare's plays. Had the Third Circuit followed them in order, ACCA likely would not be petitioning this Court. Justice Steven suggests, first, "read the statute." Only if there is ambiguity, do the next four canons come into play. Second, "[r]ead the entire statute." Third, read the text "in its contemporary context." Fourth, if "ambiguity persists" and you are "desperate, or even if you just believe it may shed some light on the issue, consult the legislative history." Finally, "use a little common sense" to avoid "an absurd result." John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 Pa. L. Rev. 1373 (1992).

started step one with a determination of the plain meaning of the PRA provisions at issue and, if necessary, broadened its inquiry into the PRA's design as a whole. *See also Sullivan v. Stroop*, 496 U.S. 478 (1990); *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1510, 1522 (Scalia, J., concurring) (1994). Given that the court of appeals here found no specific ambiguity in the statute, and no gap in the statute the Postal Service is delegated authority to fill, its review of the legislative history was at least premature, if not irrelevant.

Had the court of appeals confined its analysis in step one to plain meaning based on the enacted text as suggested by *K Mart* and *Chicago*, it could not have reversed the district court based either on the Postal Service's business justifications or on any difficulty with the meaning of certain terms in the statute. The appropriate analysis would have proceeded as follows:

First, there is nothing in the text of the non-discriminatory rate, class and cost provisions at issue to suggest that the Postal Service has discretion to disregard them for business reasons. Indeed, neither the Postal Service nor the Third Circuit has identified any provision elsewhere in the PRA providing such discretion. *See Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). In *Maislin*, this Court held that the ICC did not have statutory discretion to abandon the "filed-rate doctrine." Similarly, in *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 114 S.Ct. 2223, 2233 (1994), the Court refused to permit the FCC to abandon the filed-rate doctrine.

Second, the text of the anti-discrimination provisions clearly adheres to the public utility published rate and class model. Indeed the term "rate," which is used repeatedly in the non-discrimination provisions,[8] itself

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[8] "Rates" is used as follows: "postal rates" in § 101(d), "reasonable rates" in § 403(a), "rates" in § 403(c), "rates of postage" in § 407(a), "Postal Rate Commission" in Chapter 36, "rate or rates of postage" in § 3622.

encompasses the utility model and the non-discrimination concept. It is an unambiguous term of art in the public utility model which Black's Law Dictionary at 1261 (6th ed. 1990) defines as follows:

> **Rate**. In connection with public utilities, a charge to the public for a service open to all and upon the same terms.

Third, the following statutory terms modifying the terms "rates" and "costs" confirm the statutory design adopting the public utility model: the requirement that costs be apportioned "on a fair and equitable basis" in § 101(d), that the rates be "fair and reasonable" in § 403(a), and that such rates avoid "undue or unreasonable discrimination [and] . . . preferences" in § 403(c). The modifying terms are all part of the public utility lexicon and are consistent with the use of "rate" in the statute.[9]

Fourth, references to "categories of mail and mail users" in § 403(b)(2), mail "classifications" in § 403(c) and a "mail classification schedule" in § 3623 further support the plain meaning of the statute as requiring published rates and classes as opposed to contract prices and customized services. *See supra* note 9. The statute has plain meaning: it requires published "rates" and thereby prohibits private deals. That should have ended the inquiry.

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[9] The court of appeals appears to attempt to justify its incursion into the legislative history in step one by finding difficulty in defining "fair" and "equitable" and "undue or unreasonable discrimination of preferences." However, what is at issue is not whether any particular ICM price is discriminatory, but whether the statutory use of those terms precludes the Postal Service from abandoning published rates and classes. The court's definitional difficulties are irrelevant. *See, e.g., Cities of Newark, et al. v. Federal Energy Regulatory Commission*, 763 F.2d 533 (3d Cir. 1985) (Becker, J.); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (using similar terms without apparent difficulty).

III.

TO RESOLVE DIRECT CONFLICT OVER PRA'S PRIMARY PURPOSE

The Third Circuit's determination of the PRA's primary purpose (1) conflicts directly with the District of Columbia Circuit's determination and this Court's suggestions of congressional intent, (2) is at odds with the public utility ratemaking model adopted by the PRA, and (3) misconstrues "businesslike" as used in legislative history.

First, the Third Circuit determined that the primary purpose underlying the PRA was to require the Postal Service to adopt "modern business practices." App. 30a to 31a, *see* App. 7a, 40a, 41a. In contrast, the District of Columbia Circuit has held that "[i]n the context of postal ratemaking, . . . the dominant objective of Congress . . . was . . . the prevention of discrimination among the mail classes." *National Association of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392, 403 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

The Supreme Court has not addressed any "primary purpose" or "dominant objective" of the PRA directly. However, it has recognized the nondiscrimination objective in the context of a challenge to domestic rates, stating that Congress:

> attempted to remove undue price discrimination and political influence by placing ratesetting in the hands of a Rate Commission, composed of "professional economists, trained rate analysts, and the like," independent of Postal Service management, and subject only to Congress' "broad policy guidelines."

National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810, 822 (1983) (*NAGCP*) (citations omitted). The broad guidelines constraining the Postal Service, as referenced by this Court in *NAGCP*, are the anti-discriminatory provisions of § 101. In *NAGCP*,

the Court noted that protection against discrimination and cross-subsidies benefits consumers and competitors alike: "Congress intended to prevent undue imposition on users of monopolized classes [of mail], and to prevent unfair competition . . . " vis-a-vis "the general public . . . and enterprises in the private sector of the economy engaged in the delivery of mail. . . . " *Id.* at 829 n.24. In its decision below, the Third Circuit denigrated and impeached the "broad policy guidelines" constraining discrimination by the Postal Service, elevating the Postal Service's commercial motives over the anti-discrimination provisions as the gauge for permissible postal rates. *See* App. 24a to 26a.

Second, the Third Circuit misconstrued the term "businesslike" in the legislative history to increase the Postal Service's discretion to abandon its published rates. As used in the legislative history, "businesslike" was a shorthand term for removing Congress from the rate-making process. "Businesslike" is simply used as an antonym for "political." This interpretation is reinforced by Justice Blackmun's use of the phrase for a unanimous Court in *NAGCP*:

> Congress sought to ensure that the Postal Service would be managed "in a businesslike way." There is no suggestion in the legislative history that Congress viewed the exercise of discretion [by the Postal Rate Commission] as an evil in itself. Congress simply wished to substitute the educated and politically insulated discretion of [Postal Rate Commission] experts for its own."

NAGCP, 462 U.S. at 822-823.

Commentators agree: "business practices" was a term of art in the 1970 reorganization. William Ty Mayton, *The Mission and Methods of the Postal Power, in* Governing the Postal Service 60, 90 (J. Gregory Sidak ed., 1994). "These words referred simply to an allocation to the Post Office, as opposed to Congress, of major portions of a service that otherwise continued as a government operation." *Id.* The legislative history contains variations on this theme

that confirm this usage. For example, operation of the Postal Service in a "businesslike" manner was an antidote to the "revolving door" political patronage system believed to shorten the tenure of Postmasters General when the Postal Service was thought to need continuity of top management. H.R. Rep. No. 1104, 91st Cong., 2d Sess. at 12 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649.

Indeed, there is no suggestion in the word "businesslike" of unfettered pricing discretion. *See* definitions of "businesslike" and "business," Webster's Encyclopedic Unabridged Dictionary of the English Language (Gramercy Books 1989) (suggesting efficiency and profit-making activity). Contrary to the Third Circuit's mistaken impression (App. 7a, 31a), the PRA did not make the Postal Service into a for-profit enterprise. Rather, it retained its character as a "basic and fundamental service provided to the people by the Government. . . . " § 101(a). Moreover, there is nothing contradictory about businesslike commercial enterprises having to publish rates. *See Maislin* (requiring published rates by for-profit truckers).

Finally, the Third Circuit's misuse of the term "businesslike" in the legislative history to override the anti-discrimination provisions in the statute runs afoul of the *raison d'etre* of the Postal Service and the Private Express Statutes, namely, "to provide postal services to bind the Nation together." § 101(a); *see ACCA I*, 498 U.S. at 527 ("The PES enable the Postal Service to fulfill its responsibility to all communities at a uniform price. . . . "). Without uniform rates and classes, there is no justification for the PES or the Postal Service itself.

IV.

TO CONSIDER POLICY OF DEFERENCE TO MONOPOLIST'S COMMERCIAL MOTIVES

The Third Circuit purported "not [to] rely on any deference" to the Postal Service in reaching its decision. App. 43a. However, in reversing the district court's holding that the ICM rule violated three anti-discrimination

provisions, the court of appeals cited the Postal Service's business justifications. *See supra* pp. 9-12. Thus, in spite of the court's disclaimer, its deference is unmistakable. Even "reduced" deference raises the policy issue of whether the Postal Service's interpretations of the PRA, motivated by commercial considerations and affecting competitive markets, warrant deference. The courts should accord no deference because a monopolist's attempt to influence competitive markets warrants Sherman Act skepticism, not *Chevron* deference.

The Postal Service is unique among American public institutions. On the one hand, the Postal Service has "the 'status of a private commercial enterprise' " (App. 43a), has no sovereign immunity (*id.*), is outside the congressional appropriation process and receives no tax funds,[10] and is managed by a Board of Governors that cannot be removed by the President. *Mackie v. Bush*, 809 F.Supp. 144, 148 (D.D.C. 1993), *vacated sub nom. Mackie v. Clinton*, 10 F.3d 13 (D.C. Cir. 1993); *see Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 512-13 (D.C. Cir. 1993). Thus, neither the Legislative nor Executive Branches has the normal "democratic" control over the Postal Service. *See Chevron*, 467 U.S. at 865. Further, the Postal Service calls itself a "big business";[11] it claims that each of its "seven product lines would qualify as a Fortune 200 company on its own."[12] In 1994, it had revenues

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[10] The Postal Service has been "totally self-supporting" since 1982 with all of its operations "funded from the sale of stamps and none of them from taxes." U.S. Postal Service Advertisement, Wall St. J., November 20, 1995 at A15.

[11] Bill McAllister, "Postmaster General Touts Bottom-Line Gains on Wall Street Visit," Washington Post, November 18, 1995 at A4 (quoting Postmaster General Marvin T. Runyon speaking to New York Society of Security Analysts).

[12] U.S. Postal Service, PostalFACTS (January 1995) (document can be retrieved from the Postal Service's Internet site at http:\\www.usps.gov\history\pfact95.htm).

of nearly $50 billion,[13] of which it derived nearly $40 billion from First and Third Class mail protected by the PES[14] and $1.6 billion from international mail markets[15] not protected by the PES.

On the other hand, the Postal Service claims authority to issue quasi-legislative rules (including the ICM rule), rules broadening[16] and narrowing[17] the scope of its monopoly and rules governing the terms under which it and its competitors may compete.[18] Putting aside whether the Postal Service actually has all the authority it claims under the PRA, is it the type of "agency," and is the commercially motivated ICM rule the type of agency action, properly subject to *Chevron* deference?

Significant potential for predatory pricing and price discrimination exists when a monopoly in one market competes in collateral competitive markets; it can eliminate competition in the competitive market and can lead to inefficiencies in the monopoly market. II Alfred E. Kahn, The Economics of Regulation 247 (1971); *see also* I Kahn 172, 176. This is a recognized problem in the delivery industry when postal administrations offer some services for which they have a lawful monopoly and some services where competition with private entities is allowed. In such cases, postal rates must relate explicitly

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[13] United States Postal Service, The 1994 Annual Report of the Postmaster General 30-31 (1995).

[14] *Id.*

[15] GAO Report, *supra* note 2 at 12.

[16] *See* 39 C.F.R. § 310.1(a) (1995) (defining the statutory term letter).

[17] *See* 39 U.S.C. § 601 (1988); 39 C.F.R. §§ 320.6, 320.8 (1995). *See* App. 8a.

[18] *See, e.g.*, 39 C.F.R. § 320.6(c) (1995) (privately carried letter is presumed urgent and outside PES at twice priority mail rate); IMM 790 (1995) (defining mail posted abroad by U.S. residents as U.S. origin mail subject to additional domestic postage charge for delivery).

to the underlying cost of services of the postal administration and there is a need for attention to the structure and process of governmental oversight, including the monitoring of meaningful cost figures. George H. Hall, *Regulatory Systems for Postal Rates, in* Regulation and the Nature of Postal Delivery Services 223, 232 (Michael A. Crew & Paul R. Kleindorfer eds., 1993).

These problems inhere to the Postal Service's international service, where it is both the competitor and sole government oversight, because of the Postal Service's ability to "take advantage of its autonomy and protected letter mail monopoly to subsidize its entry and expansion in competitive markets." J. Gregory Sidak & Daniel F. Spulber, Protecting Competition from the Postal Monopoly 1 (AEI Press 1996). This raises a fundamental issue "whether Congress' grant of a monopoly to the Postal Service over the delivery of letter mail should be used to restrict or supplant private commerce in other markets." *Id.* "[T]he diversion of business from private companies by a public enterprise is tantamount to government regulation of competitive markets." *Id.* at 87.

The PRA's purpose of preventing price discrimination and predatory pricing is among the goals of the Sherman Act, 15 U.S.C. §§ 1-7 (1994). *See generally* 1 ABA Antitrust Section, Antitrust Law Developments 195-274 (3d. ed. 1992). The use of price discrimination and predatory pricing by monopolies to gain advantage in competitive markets is of particular concern. *See generally id.* at 250; ABA Antitrust Section, Annual Review of 1992 Antitrust Law Developments 95 (1993). The Postal Service's business justifications for the ICM rule confirm the private sector's concerns about predatory intent. The Postal Service admits that it cannot offer the ICM service to all because the negotiation and implementation costs alone could exceed its earnings. App. 28a. It also admits its goal to use the bundling of ICM services to get *all* the business of big companies. App. 30a. These suggestions of below-cost pricing and predation warrant scrutiny under the PRA and the antitrust laws, alike. That scrutiny will be

impeded by the Third Circuit's acquiescence to the Postal Service's self deregulation from the rate publication requirement.

There is an additional danger in the Third Circuit's "businesslike" rationale. Although the court limited its holding to international rates, the "businesslike" language of the legislative history is not confined to international ratesetting. Thus as *ACCA II's* determination that the Postal Service need not seek Postal Rate Commission (PRC) approval for published international rates led the Postal Service to "push the envelope" to escape the requirement of publication altogether, unless reversed, the Third Circuit's decision may lead to additional self-deregulation domestically by the Postal Service. Other than the fact that it is "plain wrong," there is little to keep the "businesslike" rationale from being tested to deregulate domestic postal services in competitive markets. Already the Postal Service has created domestic discounts without PRC approval. On July 19, 1994 the Postal Service announced a "partnership" with Price Costco Stores whereby Price Club and Costco Stores would discount postage on Express Mail and Priority Mail that the Postal Service sells them at "face value." U.S. Postal Service, News Release No. 68 (July 18, 1994).[19]

Finally, the issue of whether changed circumstances in the marketplace justify the abandonment of statutory filed or published rate requirements has reached this Court in two other industries: trucking and telecommunications. Each time, the Court said no. *Maislin*, 497 U.S. 122, 126-27, 135 (ICC's new "Negotiated Rates" policy rejected by Court in view of statutory duties and prohibition of discrimination in favor of strict filed-rate requirements); *MCI Telecommunications Corp.*, 114 S.Ct. at

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[19] Document can be retrieved from the Postal Service's Internet site at http:\\www.usps.gov\ news\press\95\95068new.htm.

2231 (dominant firm required to file rate even after deregulation to prevent "unreasonableness and discrimination"). No deference was accorded to either the ICC or the FCC, the government agencies in those cases. There is even less reason to defer to the Postal Service, a rulemaker with a commercial self-interest.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1995

UPS WORLDWIDE FORWARDING, INC.

v.

UNITED STATES POSTAL SERVICE, Appellant.

Air Courier Conference of America/ International Committee (Intervenor in District Court).

No. 94-7423.

United States Court of Appeals, Third Circuit.

Argued March 10, 1995.

Decided Sept. 15, 1995.

Before: BECKER, SCIRICA, and WOOD, Jr.*, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In this case, UPS Worldwide Forwarding seeks to prevent the United States Postal Service from implementing a new service for customers that ship significant quantities of international mail. In response, the Postal Service attacks UPS's standing to bring suit. The district court determined that UPS had standing but that the Postal Service exceeded its authority in promulgating the new program. We will reverse.

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* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Judicial Circuit, sitting by designation.

I.

In July 1992, the Postal Service announced the creation, on an interim basis, of an International Customized Mail ("ICM") service. *See* 57 Fed.Reg. 30651 (1992). Despite protests from UPS, a large delivery company that competes with the Postal Service, the Postal Service adopted the ICM program on a permanent basis in May 1993. *See* 58 Fed.Reg. 29778 (1993).

Under the ICM service, qualifying international mailers negotiate individualized service agreements with the Postal Service to establish the kind of services to be provided and the rate of postage. To qualify for the service, international mailers must be capable, on an annual basis, of mailing at least one million pounds of international mail or paying at least two million dollars in international postage. *Id.*

Two months after publication of the permanent regulation, UPS filed suit in the District of Delaware, alleging the ICM service violated several provisions of the Postal Reorganization Act ("PRA"), Pub.L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C. §§ 101-5605). The Postal Service disagreed, claiming that its promulgation of the ICM regulation did not exceed its statutory authority. The Postal Service also contended that UPS lacked standing to file the action. Air Courier Conference of America/International Committee ("ACCA"), an unincorporated association of firms engaged in letter and parcel delivery services, then filed a motion to intervene.

Subsequently, the district court granted UPS's motion for summary judgment. *UPS Worldwide Forwarding, Inc. v. United States Postal Serv.*, 853 F.Supp. 800 (D.Del.1994).

First, the court held that UPS had standing to challenge the Postal Service program. *Id.* at 804. Second, the court found the ICM service violated several sections of the PRA, codified at 39 U.S.C. §§ 101(d),[1] 403(b)-(c),[2] and 407(a)[3] (1988), and issued an injunction barring the Postal Service from operating the program. *Id.* at 804-07. Finally,

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[1] Section 101 provides statements of "Postal policy":

. . . .

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

[2] Section 403 provides the "[g]eneral duties" of the Postal Service:

(b) It shall be the responsibility of the Postal Service –

. . . .

(2) to provide types of mail service to meet the needs of different categories of mail and mail users. . . .

. . . .

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

[3] Section 407 governs "[i]nternational postal arrangements":

(a) The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries. The decisions of the Postal Service construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be conclusive upon all officers of the Government of the United States.

the court granted ACCA's motion to intervene. *Id.* at 806-07. The Postal Service appealed.

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1339 (1988) and 39 U.S.C. § 409(a) (1988). We have jurisdiction under 28 U.S.C. § 1291 (1988). Our review of these issues of standing and statutory construction is plenary. *See Polychrome Int'l Corp. v. Krigger,* 5 F.3d 1522, 1530 n. 19 (3d Cir.1993) ("We have plenary review of the district court's judgment on standing."); *Resolution Trust Corp. v. Cityfed Fin. Corp.,* 57 F.3d 1231, 1237 (3d Cir.1995) ("Our review of the construction of federal statutes is plenary.").

II.

Before addressing standing and the merits, we consider the history of the statutory sections and regulations at the core of this dispute. This review takes us back more than two hundred years.

In 1789, the First Congress established a Post Office and provided for the appointment of a Postmaster General. *See* Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; *National Ass'n of Greeting Card Publishers v. United States Postal Serv.,* 462 U.S. 810, 813, 103 S.Ct. 2717, 2721, 77 L.Ed.2d 195 (1983). Three years later, Congress approved a statute that "established basic mail rates, granted the Post Office Department a monopoly on mail delivery and authorized the creation of post roads." *See* Joseph W. Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making,* 42 Buff.L.Rev. 253, 257 (1994); *see also* Act of Feb. 20, 1792, ch. 7, 1 Stat. 232. Under this Act, Congress set the

rates not only for domestic mail, but also for letters and parcels sent abroad. *Id.* § 26, 1 Stat. at 239.

In 1825 and 1827, Congress passed laws prohibiting the private carriage of letters via stage, boat, horseback, or on foot, thereby "target[ing] transportation of mail which even then was contracted out to private carriers." *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 526, 111 S.Ct. 913, 919, 112 L.Ed.2d 1125 (1991). In the 1825 statute, Congress once again set the rate for domestic and international mail. *See* Act of Mar. 3, 1825, ch. 64, §§ 13, 34, 4 Stat. 102, 105, 112.

Despite the prohibitions on private carriers of mail, "high postal rates enabled private expresses to make substantial inroads into the domestic market for delivery of letters and the 1825 and 1827 Acts proved unsuccessful in prosecuting them." *Air Courier Conference*, 498 U.S. at 526, 111 S.Ct. at 919. In response, Congress passed a series of laws between 1845 and 1851 reducing postage rates. Belluck, *supra*, at 258. Congress believed the 1845 Act, which strengthened the postal monopoly and reduced rates, "would have the dual virtues of driving private expresses out of business and increasing mail volume of the Post Office." *Air Courier Conference*, 498 U.S. at 527, 111 S.Ct. at 919 (citing Act of Mar. 3, 1845, 5 Stat. 732). The 1851 Act continued the trend of reducing rates, but for the first time permitted those international rates set by Congress to be changed via "postal treaty or convention already concluded or hereafter to be made." *See* Act. of Mar. 3, 1851, ch. 20, § 1, 9 Stat. 587, 588. The Act also provided:

> [T]he Postmaster General, by and with the advice and consent of the President of the United States, shall be, and he hereby is, authorized to reduce or enlarge, from time to time, the rates of postage upon all letters and other mailable matter conveyed between the United States and any foreign country, for the purpose of making better postal arrangements with other governments, or counteracting any adverse measures affecting our postal intercourse with foreign countries. . . .

Id. § 2, 9 Stat. at 589. In 1872, Congress combined into one statutory section the authority of the Postmaster General to negotiate postal treaties and change international rates. *See* Act of June 8, 1872, ch. 335, § 167, 17 Stat. 283, 304 ("[T]he Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries.").

Although technology advanced rapidly over the next century, the organization of postal services remained largely unchanged. Congress continued to set domestic mail rates, *see* 39 U.S.C. chs. 51-69 (1964), and the Postmaster General retained the authority to change international rates, with the advice and consent of the President. *Id.* § 505. Congress also maintained the Post Office monopoly over mail delivery in an effort to keep revenues high and mailing costs low. *Air Courier Conference*, 498 U.S. at 527-28, 111 S.Ct. at 919-20.

By 1970, however, the Post Office "faced a major financial crisis" that resulted in significant backlogs of mail and postal worker strikes. Belluck, *supra*, at 262, 265.

Congress responded by passing the Postal Reorganization Act, an overhaul of the entire postal system that represented "a dramatic break with the past." *See Mail Order Ass'n of America v. United States Postal Serv.*, 986 F.2d 509, 512 (D.C.Cir.1993); *see also* H.R. No. 1104, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3651-52.

The PRA "abolished the Post Office Department, which since 1789 had administered the Nation's mails," and replaced it with the United States Postal Service, an independent agency within the executive branch. *National Ass'n of Greeting Card Publishers*, 462 U.S. at 813, 103 S.Ct. at 2721. The Act divested Congress of control over postal rates, *id.*, with domestic rates set through a complex process involving the Postal Service, Postal Rate Commission, and Governors of the Postal Service, and international rates set by "[t]he Postal Service, with the consent of the President." *Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1216-23 (3d Cir.1992) (quoting 39 U.S.C. § 407(a)). Congress also ordered the Postal Service to become self-sustaining, generating enough revenue to cover its expenses, thereby "launching 'the Postal Service into the commercial world.' " *Loeffler v. Frank*, 486 U.S. 549, 556, 108 S.Ct. 1965, 1970, 100 L.Ed.2d 549 (1988) (quoting *Franchise Tax Bd. of California v. United States Postal Serv.*, 467 U.S. 512, 520, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984)); *see also H.R. No. 1104, 91st Cong., 2d Sess., reprinted in* 1970 U.S.C.C.A.N. at 3665. At the same time, the Act generally required fairness and forbade undue discrimination or preferences in the establishment of postal rates and services. *See* 39 U.S.C. §§ 101(d), 403(c).

The PRA continued the Postal Service's statutory monopoly "over the carriage of letters in and from the United States," *see* Air Courier Conference, 498 U.S. at 519, 111 S.Ct. at 915. (citing 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606), but it permitted the Postal Service to suspend its monopoly "where the public interest requires." *Id.* (citing 39 U.S.C. § 601(b)). In 1979, the Postal Service suspended its monopoly over "extremely urgent letters" sent within the United States and abroad, thus allowing private couriers such as UPS to compete with it in the overnight delivery of letters. *See id.* (citing 39 C.F.R. § 320.6). In 1986, it went further by generally suspending its monopoly over mail sent abroad. *See id.* at 519-20, 111 S.Ct. at 915-16; *see also* 39 C.F.R. § 320.8.[4]

III.

Article III of the Constitution restricts the "judicial power" of the United States to the resolution of "cases" and "controversies." *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 757-58, 70 L.Ed.2d 700 (1982). Subsumed within this restriction is the requirement that "a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Id.* U.S.C.A. Const. Art. 3, § 1 et seq. Standing has constitutional and prudential components, both of which must be satisfied before a

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[4] Section 320.8 suspends the postal monopoly for "international remailing," which involves "bypassing the Postal Service and using private courier systems to deposit with foreign postal systems letters destined for foreign addresses." *Air Courier Conference*, 498 U.S. at 520, 111 S.Ct. at 915-16.

litigant may seek redress in the federal courts. *Id.*; *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir.1994).

I A.

Earlier this year, the Supreme Court reiterated the three elements necessary to satisfy "the irreducible constitutional minimum of standing":

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, ___ U.S. ___, ___, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)).

In this case, there is no dispute that UPS meets the constitutional standing requirements. First, as a competitor of the Postal Service with authority to compete in the international parcel delivery market,[5] UPS stands to lose clientele lured to the Postal Service by the ICM service. Although UPS may not have demonstrated any lost business yet, the "injury in fact" component of standing merely requires that such injury be "imminent." *Id.*; *see also Schering Corp. v. FDA*, 51 F.3d 390, 395 (3d Cir.1995)

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[5] *See* 39 C.F.R. §§ 320.6, 320.8 (1994); *see also supra* part II.

(noting that "threatened injury" suffices for Article III standing). Second, the requisite "causal connection" between UPS's injuries and the Postal Service's conduct is clear; in fact, the Postal Service created the ICM program with the express purpose of "attract[ing] customers that currently use its competitors and [that] would not otherwise use the Postal Service for their international mailings. If the Postal Service is successful, the additional volume will come from competitors, not from the Postal Service's other international services." 58 Fed.Reg. 29778, 29780. Finally, a decision favorable to UPS will undoubtedly redress its injuries. If we uphold the district court's decision for UPS, the Postal Service will not be able to implement the ICM service, and UPS cannot lose customers to a program that does not exist.

B.

In addition to the Article III standing requirements, federal courts have developed prudential standing considerations "that are part of judicial self-government." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). These prudential standing rules require that:

> (1) a litigant "assert his [or her] own legal interests rather than those of third parties," (2) courts "refrain from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' " and (3) a litigant demonstrate that her interests are arguably within "the zone of interests" intended to be protected by the statute, rule or constitutional provision on which the claim is based.

Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir.1994) (citations omitted); *see also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75, 102 S.Ct. 752, 759-60, 70 L.Ed.2d 700 (1982).[6]

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[6] Intervenor ACCA contends that the Postal Service has waived its right to object to prudential standing because of its notice in the Federal Register announcing the ICM service:

> Since the Postal Rate Commission does not have jurisdiction to challenge over international rates, the Postal Service's competitors cannot challenge ICM or any other international rates in that forum. However, the Postal Service's competitors can seek judicial review of ICM rates just like they can seek judicial review of other international rates.

58 Fed.Reg. 29778, 29782 (1993).

Despite the Postal Service's statement inviting judicial review, it is uncertain whether prudential standing may be waived. The Supreme Court has given mixed signals. In *Craig v. Boren*, 429 U.S. 190, 192-94, 97 S.Ct. 451, 454-55, 50 L.Ed.2d 397 (1976), the Court hinted that the first prudential standing requirement–which requires a party to assert its own rights, not the rights of others–could be waived by a defendant. *See Elkin v. Fauver*, 969 F.2d 48, 52 n. 1 (3d Cir.) (citing *Craig* for the proposition that "prudential standing [is] not jurisdictional"), *cert. denied*, ___ U.S. ___, 113 S.Ct. 473, 121 L.Ed.2d 379 (1992); *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 128-29 (7th Cir.1989) (similarly citing *Craig*). But, in later cases, the Supreme Court has indicated plaintiffs always must satisfy the prudential standing rules. In *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 n. 8, 106 S.Ct. 1326, 1334 n. 8, 89 L.Ed.2d 501 (1986) (citing *Warth v. Seldin*, 422 U.S. 490, 517-18, 95 S.Ct. 2197, 2214-15, 45 L.Ed.2d 343 (1975)), the Court stated:

> The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the

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The first step in satisfying prudential standing is for the litigant to demonstrate that it has asserted its "own

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> propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Furthermore, recent Supreme Court opinions have held broadly that a party may never waive standing, but they have not expressly cited prudential standing. *See, e.g., United States v. Hays*, ___ U.S. ___, ___, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) ("The question of standing is not subject to waiver. . . ."); *National Org. for Women, Inc. v. Scheidler*, ___ U.S. ___, ___, 114 S.Ct. 798, 802, 127 L.Ed.2d 99 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.").

From these cases, many of our sister circuits have determined that prudential standing cannot be waived. *See Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir.1994) ("We find no authority for the plaintiffs' argument that prudential standing requirements may be waived by the parties. Recognizing a distinction between prudential and constitutional standing requirements in this context might give careless parties power to override congressional intent."); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n. 2 (D.C.Cir.1994) ("Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded."); *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir.1994) (quoting *National Wildlife Fed'n v. United States*, 626 F.2d 917, 924 (D.C.Cir.1980)) ("[A]ppellee's purported waiver of prudential standing challenge is necessarily ineffective because standing implicates federal jurisdiction."). At least one circuit has resolved the issue differently. *See Lindley for Lindley v. Sullivan*, 889 F.2d 124, 128-29 (7th Cir.1989) ("Because the Secretary failed to suggest in the district court that prudential considerations should bar David from suing on his parents' behalf, we cannot consider these arguments here.").

legal interests rather than those of third parties." *Wheeler*, 22 F.3d at 538; *see also Valley Forge*, 454 U.S. at 474, 102 S.Ct. at 759-60; *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The Postal Service alleges that UPS does not meet this first requirement because it has sued under provisions of the PRA that purportedly exist to protect users of the mail, not competitors: "Because plaintiff does not claim to be injured as a mailer, it may not challenge alleged violations of statutory provisions that protect mailers from undue discrimination." Appellant's Brf. at 14.

Our jurisprudence has not decisively settled the matter. Recently, we raised the matter of constitutional and prudential standing, even when the parties agreed that standing existed. *See Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir.1994) (citation omitted) ("[W]e have an independent obligation to consider jurisdictional issues, and 'the doctrine of standing . . . goes to the subject matter jurisdiction of the district court and the validity of its judgment *ab initio*.' "); *see also Bennun v. Rutgers State Univ.*, 941 F.2d 154, 168 (3d Cir.1991) (referring to "those constitutional and prudential [standing] limitations that restrict a court's power to act and so must be resolved before we can proceed further on the merits"), *cert. denied*, 502 U.S. 1066, 112 S.Ct. 956, 117 L.Ed.2d 124 (1992). But in *Elkin*, 969 F.2d at 52 n. 1, while defendants did not challenge plaintiff's standing, we analyzed the issue because of our "independent obligation to ensure that federal jurisdiction is present in cases that come before us." Although we found that plaintiff satisfied the Article III standing requirements, we declined to decide whether he satisfied the prudential rules. *Id.*; *see also Ditri v. Coldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 872 (3d Cir.1992) ("We find it unnecessary to decide the so-called standing issue which would, at best, only involve prudential standing.").

Because we determine that UPS has standing here, we need not resolve the issue of whether prudential standing may be waived.

We believe the Postal Service confuses this first element of prudential standing, that plaintiff assert its own rights, with the third element, that plaintiff's complaint be within the "zone of interests" the statute was designed to protect or regulate. *See, e.g., Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, ___ U.S. ___, ___, 115 S.Ct. 1278, 1283, 131 L.Ed.2d 160 (1995). Under the zone of interests test, a plaintiff must demonstrate the "interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question." *See id.* (citations omitted); *see also infra* part III.B.3. The first element only mandates that litigants assert their own legal rights, not those of others. *Wheeler*, 22 F.3d at 538. This test generally comes into play in those cases in which a party seeks to challenge agency action that affects another party. *See, e.g., id.* at 539 (holding that plaintiff "fails to satisfy the prudential requirements for standing because she improperly is seeking to vindicate the rights of a third-party, the United States").

In this case, as we have noted, the Postal Service has granted UPS and other delivery companies the right to compete in the delivery of international mail. *See* 39 C.F.R. §§ 320.6, 320.8 (1994); *see also supra* part II. If the ICM service is permitted, UPS alleges it would be injured in the exercise of its right to deliver such mail, a point the Postal Service has not contested on appeal. Therefore, we believe UPS is properly asserting its "own legal interests." *Wheeler*, 22 F.3d at 538.

2.

The second prudential standing consideration admonishes courts to "refrain from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances.' " *Id.* For example, the Supreme Court has denied standing, *inter alia,* in cases in which plaintiffs sued to protest the Vietnam War, *see Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 220, 94 S.Ct. 2925, 2932, 41 L.Ed.2d 706 (1974) ("[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public. . . . "); or to challenge the legality of the Central Intelligence Agency, *see United States v. Richardson,* 418 U.S. 166, 175, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (citation omitted) (rejecting plaintiff's attempt to "employ a federal court as a forum in which to air his generalized grievances about the conduct of government"). We hold that this dispute is not the type of "generalized grievance" that poses a barrier to standing.

3.

Finally, litigants must demonstrate their interests fall "arguably within the 'zone of interests to be protected or regulated by the statute' in question." *See Newport News Shipbuilding,* ___ U.S. at ___, 115 S.Ct. at 1283 (citations omitted); *see also Wheeler,* 22 F.3d at 538. This element represents the primary focus of the parties' dispute over standing.

In *Association of Data Processing Service Organizations, Inc. v. Camp.,* 397 U.S. 150, 153, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970), the Supreme Court formulated the

"zone of interests" element of standing. In *Data Processing*, sellers of data processing services challenged a Comptroller of the Currency ruling that permitted national banks to offer data processing services to their customers. Plaintiffs contested the ruling as contrary to a statute barring bank service corporations from engaging in "any activity other than the performance of bank services for banks." *Id.* at 155, 90 S.Ct. at 831 (citation omitted). The Supreme Court found plaintiffs had standing because their interests were within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153, 90 S.Ct. at 830.[7] Similarly, in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), the Court held a trade association of securities brokers had standing to challenge a decision by the Comptroller that national banks could operate discount brokerage services in locations outside of their home states. *Id.* at 394-403, 107 S.Ct. at 754-759. The Comptroller claimed the trade association did not have standing because it was not within the "zone of interests" of the McFadden Act, which limited national banks to conducting general business in their home states. But the Court held it was essential to consider the "zone of interests" of both the

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[7] *See also Investment Co. Inst. v. Camp*, 401 U.S. 617, 621, 91 S.Ct. 1091, 1094, 28 L.Ed.2d 367 (1971) (holding that association of investment companies had standing to challenge regulation authorizing banks to operate collective investment funds); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46, 91 S.Ct. 158, 159, 27 L.Ed.2d 179 (1970) (holding that travel agents had standing to challenge decision to allow banks to provide travel services to their customers).

McFadden Act and the National Bank Act, which the McFadden Act had amended. The Court stated, "As *Data Processing* demonstrates, we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act." *Id.* at 401, 107 S.Ct. at 758. Furthermore, as in prior cases, the Court held that "competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings." *Id.* at 403, 107 S.Ct. at 759.

Although *Clarke* noted the zone of interests "test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff," *id.* at 399-400, 107 S.Ct. at 757 (footnote omitted), recent Supreme Court jurisprudence suggests a somewhat stricter test. *See, e.g., Chem Serv., Inc. v. Environmental Monitoring Sys. Lab.*, 12 F.3d 1256, 1262 (3d Cir.1993) ("Most recently, the Court has taken a stricter view of what statute or statutes should be considered as 'relevant' for the purpose of applying the zone of interest test."). The prominent example of this stricter approach is *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991).

In *Air Courier Conference*, unions representing postal workers challenged a Postal Service regulation that suspended the postal monopoly to permit "international remailing," the practice of "bypassing the Postal Service and using private courier systems to deposit with foreign postal systems letters destined for foreign addresses." *Id.* at 520, 111 S.Ct. at 915-916. The Court of Appeals for the

District of Columbia Circuit had found standing because the PRA, the statute also at issue in this case, provided protections for workers while recodifying the Private Express Statutes ("PES"), which governed the postal monopoly over mail delivery. Thus, the D.C. Circuit concluded, the employees' interests were within the "zone of interests" of the PRA. *Id.* at 521-22, 111 S.Ct. at 916-17.

The Supreme Court reversed, holding that the Court of Appeals had erred in looking at the entire PRA in applying the "zone of interests" test. The Court stated:

> The only relationship between the PES, upon which the Unions rely for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rely for their standing, is that both were included in the general codification of postal statutes embraced in the PRA. The statutory provisions enacted and reenacted in the PRA are spread over some 65 pages in the United States Code and take up an entire title of that volume. We said in *Lujan* that "the relevant statute [under the APA] of course, is the statute whose violation is the gravamen of the complaint." To adopt the unions' contention would require us to hold that the "relevant statute" in this case is the PRA, with all of its various provisions united only by the fact that they deal with the Postal Service. But to accept this level of generality in defining the "relevant statute" could deprive the zone-of-interests test of virtually all meaning.
>
> Unlike the two sections of the National Bank Act discussed in *Clarke, supra,* none of the

> provisions of the PES have any integral relationship with the labor-management provisions of the PRA.

Id. at 529-30, 111 S.Ct. at 921 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886, 110 S.Ct. 3177, 3187-88, 111 L.Ed.2d 695 (1990) (citation omitted)). Accordingly, the Supreme Court held the unions lacked standing to bring their claim.[8]

The Postal Service contends that *Air Courier Conference* dictates that UPS be denied standing in this case.[9] It alleges the purposes behind the PRA sections involved here, 39 U.S.C. §§ 101(d), 403(b)-(c), and 407(a),[10] were not to protect competitors of the Postal Service. Instead,

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[8] Under 39 U.S.C. § 410(a), the Postal Service is not covered by chapters 5 and 7 of Title 5, the provisions of the Administrative Procedure Act that involve "Administrative Procedure" and "Judicial Review." In *Air Courier Conference*, the Supreme Court declined to determine whether § 410(a) exempts the Postal Service from judicial review under the APA, holding that the Postal Service had waived the issue. 498 U.S. at 522-23 & 523 n. 3, 111 S.Ct. at 916-18, 917 n. 3. *But see id.* at 531-32, 111 S.Ct. at 921-22 (Stevens, J., dissenting). Similarly, although the Postal Service briefly mentions the issue in a footnote, *see* Appellant's Brf. at 11 n. 3, it states it is "content" to have this case judged under the "zone of interests" test. *See* Appellant's Reply Brf. at 3 n. 1. Thus, we consider the matter waived.

[9] In *Air Courier Conference*, the trade association ACCA intervened on behalf of the Postal Service and argued the unions lacked standing, leaving the Postal Service only a "nominal[ ]" litigant. 498 U.S. at 520, 522, 111 S.Ct. at 915-16, 916-17. Ironically, the Postal Service in this case is attempting to use that decision against ACCA so as to deny it the right to intervene and UPS the right to litigate.

[10] For the text of these sections, see *supra* notes 1-3.

the Postal Service claims that §§ 101(d) and 403(b)-(c), which generally require fairness in establishing postal rates, were intended to protect mailers. Furthermore, the Postal Service argues that § 407(a) was meant to protect the president's foreign policy authority, not the interests of private Postal Service competitors. Thus, the Postal Service asserts, UPS should be denied standing here.

We believe the Postal Service misconstrues the lessons of *Air Courier Conference* and its predecessors. These cases do not require that plaintiffs be among the intended beneficiaries of the statute under which they are suing. *See, e.g., Clarke,* 479 U.S. at 399-400, 107 S.Ct. at 757 (requiring "no indication of congressional purpose to benefit the would-be plaintiff"); *Schering Corp. v. FDA,* 51 F.3d 390, 395 (3d Cir.1995) ("The [zone of interests] test, however, is not so stringent that it requires the would-be plaintiff to be specifically targeted by Congress as a beneficiary of the statute."). Even *Air Courier Conference* merely required an "integral relationship" between the statutory provisions plaintiffs claim have been violated and the provisions under which plaintiffs claim standing. *Air Courier Conference,* 498 U.S. at 530, 111 S.Ct. at 921 (noting that "none of the provisions of the PES have any integral relationship with the labor-management provisions of the PRA");[11] *see also Chem Serv., Inc.,* 12 F.3d at

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[11] In view of the "integral relationship" language, we do not interpret *Air Courier Conference* as establishing a strict zone of interests test contrary to previous Supreme Court precedent, such as *Clarke,* where the Court stated that the zone of interests "test is not meant to be especially demanding." 479 U.S. at 399, 107 S.Ct. at 757. *Air Courier Conference,* we note, merely held that a recodification of an entire title of the United States Code,

1264-65 (upholding standing where statutes found to have an "integral relationship" with each other (quoting *Air Courier Conference*, 498 U.S. at 530, 111 S.Ct. at 921)).

In this case, we believe an "integral relationship" exists among the relevant statutory provisions. Sections 101(d), 403(b)-(c), and 407(a) provide procedures for the manner in which postal rates may be adopted and the types of rates that will and will not be permitted. As we noted *supra* in part II, the history of the Postal Service demonstrates that Congress understood that statutes setting postal rates were inextricably linked with those governing the postal monopoly. *See Air Courier Conference*, 498 U.S. at 526-27, 111 S.Ct. at 919-20 (citing Act of Mar. 3, 1845, 5 Stat. 732). Both types of statutes were intended to affect competitors. *See id.*

In fact, in *Air Courier Conference*, the Supreme Court recognized that competitors fall within the zone of interests of the postal monopoly statutes. *See id.* at 528 n. 5, 111 S.Ct. at 920 n. 5 ("The PES are competition statutes that regulate the conduct of competitors of the Postal Service. The postal employees for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers."). Although the

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covering hundreds of statutory provisions developed over the course of two centuries, did not constitute one "statute," within the meaning of the zone of interests test. *See Air Courier Conference*, 498 U.S. at 529-30, 111 S.Ct. at 921 ("The statutory provisions enacted and reenacted in the PRA are spread over some 65 pages in the United States Code and take up an entire title of that volume. . . . [T]o accept this level of generality in defining the 'relevant statute' could deprive the zone-of-interests test of virtually all meaning.").

Supreme Court noted that "[e]mployees have generally been denied standing to enforce competition laws because they lack competitive and direct injury," *id.*, it reiterated that "competitors of regulated entities have standing to challenge regulations." *Id.* at 529, 111 S.Ct. at 920. In this case, it is undisputed that UPS is a competitor of the Postal Service. Because the regulation at issue involves Postal Service rate-making – a fundamental means of affecting competition, as we noted *supra* in part II – UPS has standing to challenge it. Such standing is all the more clear in cases, like this one, where the agency that is promulgating the regulation is also the "competitor" whose interests are being advanced.

These statutes, governing the postal monopoly and postal rate-making, are on a different footing than the labor-management provisions under which plaintiffs claimed standing in *Air Courier Conference*. Those labor provisions were a new feature of the 1970 Act, unrelated to the postal monopoly provisions that had existed for more than a century. *See Air Courier Conference*, 498 U.S. at 524-28, 111 S.Ct. at 918-20. But as we have noted, the relationship between the postal monopoly and rate-making rules – and their effect on competitors – has existed for most of the two-hundred year history of the postal statutes. *See supra* part II.

Furthermore, while the Supreme Court has recognized competitors have an interest in enforcing the postal monopoly statutes, Congress has provided that competitors are within the "zone of interests" of the postal rate-making statutes. The PRA expressly requires that the Postal Rate Commission, in recommending rates, consider the effect of increases on, *inter alia*, "enterprises in

the private sector of the economy engaged in the delivery of mail matter other than letters." 39 U.S.C. § 3622(b)(4). The same section also requires the Commission to consider the "policies of this title," thereby incorporating the statements of "[p]ostal policy" of § 101, which is one of the provisions under which UPS has filed suit. Thus, we believe competitors such as UPS fall within the "zone of interests" of these rate-making statutes.

In fact, we believe the Postal Service has largely conceded the issue. In its brief, the Postal Service admitted that competitors would have standing to sue under §§ 101 and 403 if they alleged that the rates set were a "predatory attempt to destroy competition." *See* Appellant's Brf. at 16. In conceding standing in this context, the Postal Service necessarily admits that protecting competitors from economic injury caused by illegal regulations falls within the zone of interests of these statutory provisions. We fail to see why competitors would be within the zone of interests if §§ 101 and 403 were violated by the Postal Service's predatory rate pricing but not if the same provisions were violated by the Postal Service's establishment of unfair or inequitable rates.

In evaluating the PRA's rate-making provisions, it appears that Congress was concerned with balancing certain societal interests: those of government, various categories of mailers, and private competitors. Recently we faced a similar situation in *Schering Corp. v. FDA*, 51 F.3d 390 (3d Cir.1995), in which a drug manufacturer challenged the FDA's approval of a regulation that permitted its competitors, manufacturers of generic drugs, to use an abbreviated application procedure. In affirming the drug manufacturer's standing, we recognized the relevant Act

"reflect[ed] a statutory compromise of the competing concerns" of the public and of various drug manufacturers. *Id.* at 396 (citation omitted). Similarly, we view the sections of the PRA governing postal rates as striking a balance between competing concerns. Although we understand a fundamental purpose of the PRA was to make the Postal Service more competitive, we note that Congress also expressed some concern for private competitors of the Postal Service. *See, e.g.*, 39 U.S.C. § 3622(b)(4). Accordingly, we hold that UPS falls within the "zone of interests" of these statutory provisions generally governing postal rates.[12]

IV.

Turning to the merits, we address the district court's holding that the Postal Service's promulgation of the regulation establishing the ICM service violated several provisions of the PRA. *See UPS Worldwide Forwarding, Inc. v. United States Postal Serv.*, 853 F.Supp. 800, 804-06 (D.Del.1994). To understand these provisions, it is necessary to consider the framework of the rate-making sections of the PRA and how the ICM service fits within this statutory scheme.

A.

As we have noted, a fundamental change wrought by the PRA was to transfer rate-making authority from Congress to the Postal Service and related agencies. *See supra*

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[12] For the same reasons we hold UPS to have standing, we find that ACCA has standing to intervene in this case.

part II. For domestic rates, the PRA established a complex process whereby the Postal Service proposes rates, the Postal Rate Commission considers the proposals and offers its recommendations, and the Governors of the Postal Service act on the recommendations. *See Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1216 (3d Cir.1992) (citing various provisions of the PRA). In making its recommendations, the Commission is instructed to consider numerous factors listed in the PRA, 39 U.S.C. § 3622(b), and it must conduct a hearing to allow the Postal Service and public to testify. *Id.* § 3624. For certain types of mail, such as the different classes of mail for letters, the Postal Service must establish a rate that is "uniform throughout the United States, its territories, and possessions." *Id.* § 3623(d); *see also id.* § 3683 (prescribing "[u]niform rates for books; films; other materials").

In contrast to the domestic rate-making procedure, the PRA's international rate-making rules are a model of simplicity. The PRA provides:

> The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries.

39 U.S.C. § 407(a). No proposals need be made and considered by other bodies, no public hearings held, and no specific criteria considered. Instead, the Postal Service need only "establish" international rates, with the President's consent. We believe the differences between the

domestic and international rate-making procedures demonstrate that Congress intended the Postal Service to have significant authority and flexibility in establishing the rates for mail sent abroad.

B.

Pursuant to the PRA statutory scheme, the Postal Service promulgated the ICM service for international mailers. *See* 58 Fed.Reg. 29778 (1993). In publishing its interim regulation, the Postal Service offered two primary reasons for the ICM service. First, it explained that other countries have adopted varying charges on mail sent from the United States, with some based on weight and others on volume. A uniform price for overseas mail, particularly for large-volume customers, meant that "some customers face[d] published rates disproportionate to the costs that the Postal Service would incur in providing those customers with the services in question. . . . " 57 Fed.Reg. 30651, 30652 (1992). The Postal Service explained:

> Until relatively recently, the most significant components of the costs incurred by the Postal Service in connection with its international operations, namely transportation expenses and the charges imposed by foreign postal administrations to deliver U.S.-origin mail (terminal dues), were based exclusively on weight. Although transportation expenses are still a function of weight, the postal administrations of countries to which much U.S. mail is sent have implemented terminal dues arrangements that recognize that mail processing costs vary by volume as well as by weight. Moreover, the

> Postal Service currently is charged terminal dues by foreign postal administrations using four different methods of calculation. Consequently, the Postal Service incurs substantially different costs for delivering mail to different countries. Due to uniform pricing, however, the Postal Service's rates do not reflect country-specific costs to the extent possible. Similarly, uniform rates do not generally take into account differences in how mail is prepared or where it is tendered, both of which can significantly affect costs.

Id. (footnote omitted).

Second, because of the regulation permitting private couriers to deliver international mail, the Postal Service faced increasing competition from companies attempting to lure mailers by "implementing flexible rate structures and customer-specific service offerings." *Id.* The Postal Service noted:

> This flexibility enables the Postal Service's competitors to tailor service features to individual customers and to price those features on a partially or completely disaggregated basis. In contrast, traditional Postal Service pricing policies and practices, whereby the Postal Service generally treats all current and potential customers identically and uses averaged costs when setting rates, are not designed to deal with a competitive environment. The expanded alternatives available to customers and the improved attractiveness of those alternatives have made it increasingly difficult for the Postal Service to sell its services to a varied group of customers using a single published schedule of rates. To the extent that uniform pricing prevents the

> Postal Service from attracting new customers and keeping existing customers, all of the Postal Service's other users suffer by having to pay more for their postal services.

Id.

Despite its reasons for implementing the program, the Postal Service determined that it would not be feasible to offer ICM service to everyone "regardless of size or mailing patterns." *Id.* at 30653. The Postal Service estimated substantial costs to negotiate and implement the ICM agreements; expenses were high enough so that "for all but the largest volume customers, those costs in many instances could be greater" than the Postal Service earned from the ICM program. *Id.* Furthermore, the Postal Service expected to benefit from economies of scale generated by large-volume customers that would not occur with smaller mailers. As it noted, "[I]ncreased volumes amplify the beneficial effects of flexible pricing." *Id.* Because ICM agreements vary depending upon the level of services required by individual customers, ICM rates may be higher, lower, or the same as ordinary public rates.

C.

Despite the flexibility accorded the Postal Service in the international arena, *see supra* part IV.A, the PRA contains several general statements of policy, duties, and powers – such as prohibitions on discrimination and requirements of fairness – that serve as additional limitations on both domestic and international rates. *See 57 Fed.Reg. 30651, 30652 (1992) (listing, inter alia,* §§ 101(d)

and 403(c) as restricting rates). It is these general statutory statements of "policy" and "duties" on which UPS relies in attacking the ICM program. We will consider each of these sections in turn.

1.

Section 101 opens the PRA, outlining general statements of "Postal policy." Subsection (d) provides: "Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." A similar general requirement is contained in § 403(c), which lists the "[g]eneral duties" of the Postal Service:

> In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

The district court found the ICM service violated these provisions because, to qualify for the program, customers must be capable of mailing one million pounds of international mail or paying two million dollars in international postage per year, but they need not actually mail or pay any specified amounts. *See* 58 Fed.Reg. 29778. The district court stated:

> Under the ICM system, small-volume mailers who are not able to meet the threshold capacity requirements of the ICM agreements are not able to gain the benefit of an individually negotiated, lower rate. The costs are not apportioned

> fairly, because under the ICM, there is no requirement that the large-volume mailer actually deliver more than the small-volume mailer.

UPS Worldwide Forwarding, 853 F.Supp. at 805. The court found this set of circumstances discriminated unreasonably against small-volume mailers. *Id.* In so holding, the court stated that "[s]eemingly, there is no reasonable explanation as to why the Postal Service uses capability as a criteria rather than actual performance." *Id.* We disagree.

We believe the Postal Service has offered a reasonable explanation for its business decision to require that mailers be "capable" of tendering a certain threshold amount of mail, rather than mandating that potential customers agree up front to actually tender that minimum. As counsel explained at oral argument:

> To require a commitment would just sort of drive [potential customers] off. I mean, if you say we are not giving you this business until you commit to it, then you never get the business.
>
> It is better to make them the offer, get them to try the business, and then in practice my client informs me, once you get the business of a big company, you tend to get all its business.

Tr. at 44-45. We believe this provides a logical and reasonable explanation for the Postal Service's business decision. UPS does not contend the Postal Service's explanation fails to pass muster in an economic sense; it merely argues the Postal Service does not have the authority to make such business judgments. But Congress repeatedly indicated that a primary purpose underlying

the PRA was to require the Postal Service to discard its system of political patronage and bureaucratic decision-making in favor of modern business practices. *See infra* part IV.D. We see nothing in the PRA that prevents the Postal Service from innovative attempts to increase its business and profits, as long as it stays within the bounds of the relevant statutes.

As we have noted, § 101(d) provides that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." The determination whether a particular rate is "fair" or "equitable" is not capable of precise definition, but we do not view the ICM service as unfair or inequitable. The program may benefit large-volume mailers over their smaller counterparts because of economies of scale. That the Postal Service chose to offer the program to those "capable" of tendering a certain minimum level of mail or dollars, instead of those that actually so deliver, reflects a reasonable business decision about the most effective means to solicit new customers.

Similarly, we do not view the ICM service as violative of § 403(c)'s ban on "undue or unreasonable discrimination" or "undue or unreasonable preferences." We cannot ignore that the "undue or unreasonable" language, twice repeated in § 403(c), means that reasonable discrimination and preferences among users of the mail are permitted. Allowing a limited class–the relatively small percentage of large-volume mailers eligible to participate in the ICM program–to negotiate individual service plans at individual rates does not appear on its face to be "undue or unreasonable." As we have noted, it permits the Postal Service to compete more effectively for the

business of large-volume mailers, *see supra* part IV.B, fulfilling congressional intent. *See infra* part IV.D.[13]

As with the terms "fair" and "equitable" in § 101(d), we find it difficult to define the contours of what constitutes "undue or unreasonable" discrimination or preferences. We note that other courts, when confronting this section, have accorded postal authorities broad latitude. In *Mail Order Ass'n of America v. United States Postal Service*, 2 F.3d 408, 434 (D.C.Cir.1993), magazine publishers challenged the Postal Rate Commission's decision not to adopt a "zoned" second-class mail rate, i.e., a rate that would increase with distance. Because the Commission's decision had not violated any specific rate provision of the PRA, the Court of Appeals for the District of Columbia reasoned that:

> The question, then, is whether the Commission was arbitrary in its ultimate trade-off between the cost considerations that pointed toward zoning, and the competing values that it ultimately favored. Any such arbitrariness would presumably violate 39 U.S.C. § 403(c)'s prohibition of "undue or unreasonable preferences."

Id. at 435-36. The court noted that "[t]he refusal to zone indeed appears unsupported by any cost principle." *Id.* at 436. Nevertheless, the court ultimately held that, because

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[13] It is instructive that the Universal Postal Union, the United Nations agency governing international mail, permits postal authorities to "give preferential rates to major users of the Post." *See* 58 Fed.Reg. 29778 (citing UPU Convention, art. 20, ¶ 15).

the Commission had valid reasons for its decision, it had not violated § 403(c). *Id.* at 437.[14] Similarly, as we noted

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[14] Other courts have reached similar conclusions. In *Aimes Publications, Inc. v. United States Postal Service*, Civ. A. No. 86-1434, 1988 WL 19618, at *6 (D.D.C. Feb. 23, 1988), the court noted the Postal Service's enforcement of its second-class statutory rules apparently was "at best, uneven," but it found no violation of § 403(c). The court stated that "[t]ypically, the court[s] have given the Postal Service broad discretion in administering the classification scheme, which necessitates differentiating among users." *Id.* at *7 n. 13. And in *Egger v. United States Postal Service*, 436 F.Supp. 138 (W.D.Va.1977), a student challenged a Postal Service policy that provided a different level of service to single students living in university housing than that provided for married students. In upholding the different service levels, the court noted:

> While it is obvious that [§ 403(c)] prohibits undue or unreasonable discrimination among users in the provision of delivery services, it is also equally obvious that the Postal Service may provide different levels of delivery service to different groups of mail users so long as the distinctions are reasonable. The goal sought by the Postal Service in the instant case by their discrimination is the efficient and economical delivery of the mail. The goal is legitimate and the only question before the court is whether the distinctions between the three groups are rationally related to the achievement of the goal.

Id. at 142; *see also Time, Inc. v. United States Postal Serv.*, 710 F.2d 34, 41 n. 8 (2d Cir.1983) (holding that the disparities between the contribution to the Postal Service's fixed costs from each class of mail service "are not so great as to amount to 'undue or unreasonable discrimination among users of the mails' "); *Direct Mail/Mktg. Ass'n, Inc. v. United States Postal Serv.*, 501 F.2d 717, 722 (D.C.Cir.1974) (upholding temporary rate changes that allegedly discriminated against third-class mailers in violation of § 403(c) because the Postal Service action was "manifestly reasonable"); *Ludewig v. Wolff*, 492 F.Supp. 1048, 1049

supra in part IV.B., the Postal Service had equally valid reasons for its decision to create the ICM service.

On its face, then, we believe the ICM service does not violate § 403(c). The regulation promulgating the ICM program requires the Postal Service to "make every ICM service agreement available to similarly situated customers under substantially similar circumstances and conditions." *See* 58 Fed.Reg. 29782. To facilitate that process, the regulation mandates that the Postal Service publish detailed information about each ICM agreement, including the term, rate, type of mail involved, destination country or countries, minimum volume commitments, and descriptions of services to be provided by the Postal Service and mailer. *Id.* We believe the publication of this information will permit competitors and mailers alike to verify that the Postal Service is complying with its mandate not to grant "undue or unreasonable" discrimination or preferences.

2.

As we have noted, § 403 provides the "[g]eneral duties" of the Postal Service. Subsection (b)(2) provides: "It shall be the responsibility of the Postal Service to provide types of mail service to meet the needs of different categories of mail and mail users." The district court held the ICM program violated § 403(b)(2) because it

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(S.D.Tex.1980) (finding no violation of § 403(c) "because the distinctions made by the regulations are reasonably related to the effectuation of the pertinent objectives of the Postal Reorganization Act").

serves "individual" users, not "categories" of users. *UPS Worldwide Forwarding*, 853 F.Supp. at 804-05. We disagree.

The ICM program is open to those customers capable of tendering one million pounds of international mail or paying two million dollars in international postage. We consider that group of customers to be a "category" of mail users, and believe the Postal Service is providing "mail service to meet the needs" of that category of users by offering them the ability to negotiate individualized service plans to meet individual needs. Section 403(b) does not specify that, to meet the needs of a category of users, the Postal Service must give them all the same rate. In fact, the Postal Service may better "meet the needs" of large-volume mailers by offering them individualized service plans at individual rates.

But UPS contends that § 403(b)(2) generally prohibits individually-negotiated rates. Once again, we disagree. As we have noted, § 403(c) bars "undue or unreasonable" discrimination and preferences. That necessarily means that reasonable discrimination and preferences are permitted. *See supra* part IV.C.1. Furthermore, the various domestic mail provisions that require "uniform" rates demonstrate that Congress knew how to mandate uniformity and equality when it desired. *See, e.g.*, 39 U.S.C. § 3623(d) (requiring that rates for each class of letter mail be "uniform throughout the United States, its territories, and possessions"); *id.* § 3683 (prescribing "[u]niform rates for books; films; other materials").

Finally, we fail to understand how the statement of "[g]eneral duties" of the Postal Service could forbid the ICM program. Instead of a restriction on the powers of

the Postal Service, it merely enumerates, as its title indicates, the Service's "[g]eneral duties." Viewing the statutory scheme overall, § 403 was intended to list "[g]eneral duties," while other sections of the PRA specified duties, powers, and limitations. There is nothing in this section that bars the Postal Service from doing more than the minimum required here. Thus, as long as the Postal Service provides service to "meet the needs of different categories of mail and mail users," it also may provide individualized service. *See, e.g.*, 39 C.F.R. § 3001.68, App. A, ¶ 500.021 (describing the Postal Service's established "Custom Designed Service," in which customers negotiate with the Postal Service for specialized pick-up and delivery arrangements).

3.

Section 407(a), governing "[i]nternational postal arrangements," provides that "[t]he Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries." The district court held § 407(a) requires the President to consent to new international postal rates. *UPS Worldwide Forwarding*, 853 F.Supp. at 806. On appeal, neither party disputes this holding. But UPS makes two arguments under § 407(a).

a.

UPS contends the ICM service is prohibited by the phrase, "establish the rates of postage or other charges."

UPS claims that "establish" means to "set up . . . permanently" and "rates" are "standardized prices made available to the public at large." Appellee's Brf. at 25 (citations omitted). Thus, UPS asserts, § 407(a) does not permit the individual rates found in the ICM service. We disagree. If "establish" means creating permanent rates, the Postal Service could never change its rates. We do not believe Congress intended that result. Furthermore, the word "rates" may well indicate, as UPS claims, "standardized prices available to the public at large," but § 407(a) allows the Postal Service to "establish the rates of postage *or other charges*" (emphasis added). We believe the negotiated rates of the ICM service satisfy the latter part of the phrase, if not the former.

b.

UPS also alleges the President never manifested the requisite consent under § 407(a). The Postal Service responds that the President consented by allowing the rates to take effect without objection. Because it is clear that the President never formally consented to the adoption of the ICM service, we must consider the historical practice under the statute.

As we noted, Congress enacted legislation in 1851 permitting the Postmaster General, "by and with the consent of the President," to change the international postal rates set by Congress. *See* Act of Mar. 3, 1851, ch. 20, § 2, 9 Stat. 587, 588; *see also* Act of June 8, 1872, ch. 335, § 167, 17 Stat. 283, 304. The statute remained essentially the same until 1970, when the PRA permitted the "Postal

Service, with the consent of the President," to "establish" those rates.

Neither party has submitted any evidence that, from the adoption of the 1851 Act, the President ever has affirmatively manifested, by word or deed, his consent to changes in international rates. The Postal Service notes that international rates have changed at least sixty times since 1945, all without express presidential approval. *See* Aff. of John F. Alepa, Manager of Pricing, U.S. Postal Service, App. at 55-62; *cf. Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1222-23 (3d Cir.1992) ("Before the [PRA] was passed, international rates had been set by the Postmaster General's administrative fiat. . . . "). Thus, the undisputed historical record indicates the President and postal authorities have long interpreted § 407(a) as not requiring the affirmative consent of the President.

In its brief, UPS argues the Postal Service has offered no evidence that the President agrees with its interpretation of the § 407(a) consent provision. *See* Appellee's Brf. at 41-42. But after submission of UPS's brief, the President published a memorandum in the Federal Register, delegating until completion of this appeal his authority under § 407(a) to establish postage rates. 59 Fed.Reg. 65471 (1994). The memorandum provides:

> [T]he Government argues that the explicit consent of the President is not required. In the view of the Government, to the extent that 39 U.S.C. 407(a) does require the President to consent, it does not require that consent be given in any particular manner. The Government's position is that the failure of the President to object to the

> establishment of international postage rates and other charges is consent to the establishment of such rates and other charges. This has been the practice of the Government for the past 120 years.

Id.

Nevertheless, after viewing the unique history of the application of § 407(a), we believe the President has demonstrated how he has manifested his consent to action by the Postal Service. We decline UPS's invitation to prescribe certain procedural steps the President must take in this regard. Although such guidance might be necessary with different statutes, agencies, or branches of government, we believe it is inappropriate in this context. Although the President and the Postal Service now agree he may consent to international postal rate changes merely by not objecting, we rely only on the historical practice under § 407(a) in upholding the ICM service.[15]

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[15] UPS contends the Postal Service never argued before the district court that the President consented to the ICM service; thus, UPS claims, the Postal Service has waived this argument. Although the Postal Service disputes that it waived the issue, we need not decide the question. We may "review a waived issue under exceptional circumstances," such as when the "public interest" so requires. *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 117 (3d Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993). Because this case involves the President's authority to determine the manner of his consent to agency action and the validity of more than a century's worth of international postal rates, we hold that "exceptional circumstances" exist here.

D.

In challenging the Postal Service, its competitors characterize it as a "public service" and "essentially a public utility." *See* Appellee's Brf. at 11, 22. In the domestic area, we believe those descriptions are apt. In some ways, the skepticism surrounding the ICM service exists because the program seems antithetical to traditional notions of the Postal Service. We expect to pay the same price for a postage stamp as everyone else, not to have to bargain for the best rate. In this sense, the Postal Service is properly compared to a public utility that charges the same rate to all customers.

But the Postal Service retains its centuries-old monopoly only in the domestic market. In the international arena, Congress has freed the Postal Service from the constraints that protect domestic mail rates. *See* 39 U.S.C. § 407(a); *supra* part IV.A. Without a monopoly to protect its international business, *see* 39 C.F.R. §§ 320.6, 320.8, the Postal Service now faces competition from UPS and other entities. *See supra* part IV.B. Thus, the reasons that may compel a uniform rate for postage in the United States no longer apply to large-volume international mailers.

In enacting the PRA, Congress repeatedly explained the fundamental reason for the dramatic changes mandated by the Act; it wanted the Postal Service to operate less like a bureaucratic agency and more like a business. The relevant committee reports repeat this principle again and again. *See, e.g.*, H.R. No. 1104, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3660 ("The Postal Service is a public service but there is no reason

why it cannot be conducted in a businesslike way and every reason why it should be.").[16]

While Congress hoped to achieve efficiency in postal operations by enacting the PRA, it also sought innovation. As the House Report noted, the Act "envisions a national postal service that is forever searching for new markets and new ways by which the communication needs of the American people can be served." H.R. No. 1104, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. at 3668-69.[17] We believe the ICM service constitutes an appropriate part of that effort.

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[16] *See also H.R.Rep. No. 1104, 91st Cong., 2d Sess. (1970), reprinted in* 1970 U.S.C.C.A.N. 3649, 3650 (The PRA is intended to "[e]liminate serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent with the modern management and business practices . . . . "); *id.* at 3653 ("Top management must be given authority, consistent with its responsibilities, to provide an efficient and economical postal system. Postal management has been severely and unjustly hampered in its efforts to administer the Department in a businesslike way."); *id.* at 3654 (The bill provides "authority to conduct the affairs of the Postal Establishment on a business like basis. . . . "); *id.* at 3665 ("The mandate that the Postal Service must be self-supporting is essential if postal affairs are to be conducted with reasonable economy and efficiency."); S.Rep. No. 912, 91st Cong., 2d Sess. 3 U.S.Code Cong.Serv.1970, p. 3649 (1970) ("[P]ostal management must now be given the unfettered authority and freedom it has been denied for years to maintain and operate an efficient service."); *id.* ("[T]he laws controlling the governance of the [Post Office] Department have become excessively restrictive and [ ] it is not too soon for a complete break with the past.").

[17] *See also* H.R.Rep. No. 1104, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3657 ("The Postal Service is empowered to engage in research and development programs

V.

As a final matter, we consider the proper level of deference to be accorded the Postal Service's interpretation of the PRA. The Postal Service contends its regulations are to be given "controlling weight" as long as they represent a "reasonable interpretation" of the statute, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). We confronted this general issue in *Air Courier Conference v. United States Postal Service*, 959 F.2d 1213, 1223-25 (3d Cir.1992), and we found *Chevron* to be controlling.

In *Air Courier Conference*, we considered whether the PRA required the Postal Rate Commission to consider any Postal Service change to international rates. 959 F.2d at 1215-16. In deciding the PRA did not require it, we noted the Postal Service and the Commission agreed that the latter agency played no part in international ratemaking. We found the "argument that the Postal Service's

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directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States"); *id.* at 3668 (The PRA "is designed to prevent public service from involving public wastefulness in postal matters. This must be done not only by requiring postal management to operate efficiently and economically, but also by requiring it to seek out the needs and desires of its present and potential customers – the American public."); S.Rep. No. 912, 91st Cong., 2d Sess. 3 U.S.Code Cong.Serv.1970, p. 3649 (1970) (noting prior postal laws "inhibit[ed] innovation and imagination in the management of the Post Office").

bureaucratic bias lessens the need for deference is counter-balanced by the express acquiescence of the Commission in the Postal Service's view." *Id.* at 1225. As UPS notes, such concurring agency views do not exist here.

In reaching our decision in favor of the Postal Service, we have been convinced that Congress intended the PRA to permit the agency to operate more like a private business. *See supra* part IV.D. As the Supreme Court has noted, "[b]y launching 'the Postal Service into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.' " *Loeffler v. Frank*, 486 U.S. 549, 556, 108 S.Ct. 1965, 1970, 100 L.Ed.2d 549 (1988) (citations omitted). Because in this case we construe a Postal Service regulation explicitly designed to "attract customers that currently use its competitors," *see* 58 Fed.Reg. 29778, 29780, it would appear that a reduced level of deference is appropriate here. But we are convinced the ICM service does not contravene the PRA, and so we do not rely on any deference that might be due.

VI.

For the reasons expressed, we will reverse the judgment of the district court.

UPS WORLDWIDE FORWARDING, INC., Plaintiff,

v.

UNITED STATES POSTAL SERVICE, Defendant.

Civ. A. No. 93-340-JLL.

United States District Court,

D. Delaware.

May 16, 1994.

OPINION

LATCHUM, Senior District Judge.

I. BACKGROUND

On July 22, 1993, plaintiff, UPS Worldwide Forwarding, Inc. (hereinafter "UPS"), filed its complaint against defendant, United States Postal Service (hereinafter "POSTAL SERVICE"), alleging that the Postal Service's new international mail agreement, International Customized Mail (hereinafter "ICM") Service, violates various provisions of the Postal Reorganization Act (hereinafter "PRA"), specifically 39 U.S.C. §§ 101(d), 403(b)-(c), and 407(a).[1] (Docket Item ["D.I."] 1.) In response to the Postal

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[1] Section 101(d) states:

> Postal rates shall be established to *apportion the costs* of all postal operations to all users of the mail on a fair and equitable basis. (Emphasis supplied.)

39 U.S.C. § 101 (1980).

Section 403(b) states:

> It shall be the responsibility of the Postal Service – . . . (2) to provide types of mail service to meet the needs of different *categories* of mail and mail users. (Emphasis supplied.)

Service's motion to dismiss for lack of standing, or alternatively, pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, (D.I. 5), UPS filed its amended complaint on November 2, 1993, alleging more specifically that it was threatened with a substantial loss of business due to the Postal Service's ICM Service. (D.I. 14, ¶¶ 19, 21.) Meanwhile, on October 19, 1993, Air Courier Conference of America/International Committee (hereinafter "ACCA"), an unincorporated membership association consisting of firms engaged in providing letter and parcel delivery services in the United States and between the United States and foreign countries, moved for leave to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. (D.I. 10.) On November 16, 1993, the Postal Service filed its motion to dismiss the amended complaint. (D.I. 17.) UPS responded with its motion for summary judgment, filed January 14, 1994. (D.I. 28.) On April 7, 1994, the Court

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Section 403(c) states:

> In providing services and in establishing classifications, rates, and fees under this title, the Postal Service *shall not*, except as specifically authorized in this title, *make any undue or unreasonable discrimination* among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user. (Emphasis supplied.)

39 U.S.C. § 403 (1980).

Section 407(a) in relevant part states:

> The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries.

39 U.S.C. § 407 (1980).

heard oral argument on plaintiff's motion for summary judgment, defendant's motion to dismiss the amended complaint, and ACCA's motion to intervene. Before the Court now for consideration are the various motions of these parties.

II. FACTS

On May 24, 1993, the Postal Service established its new ICM Service, which is available to customers who are capable of tendering large quantities of international mail. (D.I. 6 at 5.) Specifically, the ICM Service allows the Postal Service to negotiate individually with customers who are capable of mailing annually either one million pounds of international mail or two million dollars of international postage, and the customer must also be capable of tendering such international mail from a single location. (D.I. 6 at 6.)

In its complaint, UPS alleges that: (1) the PRA does not authorize the Postal Service to negotiate individual prices and that international service rates must be uniform for all mailers sending the same type of mail to the same destination (D.I. 14 at ¶¶ 13-18); (2) it is not possible to determine whether the Postal Service is making the same terms available to similarly-situated customers because it does not disclose certain elements of the ICM Service (D.I. 14 at ¶ 22); and (3) the ICM Service has been adopted without consent of the President of the United States as is required by the PRA (D.I. 14 at ¶¶ 26-28).

Defendant, the Postal Service, argues that: (1) UPS lacks standing to challenge the ICM Service (D.I. 18 at 10-18); (2) ICM is not in contravention to the PRA (D.I. 18

at 18-28); and (3) presidential consent is not required (D.I. 18 at 28-38).

Plaintiff seeks a permanent injunction restraining the Postal Service from entering into ICM agreements or from rendering ICM Service and from otherwise rendering international mail service to individual mailers at prices different from the rates established for the public at large. (D.I. 14 at 7-8.)

III. APPLICABLE LAW

As stated above, defendant moved to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) and for lack of standing. Fed.R.Civ.P. 12(b) provides that if a motion is made under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed.R.Civ.P. 12(b). *See also Pfizer, Inc. v. Elan Pharmaceutical Research Corp.*, 812 F.Supp. 1352, 1357 (D.Del.1993). Additionally:

> [S]ince a motion to dismiss for lack of standing does not raise a question going to the merits of the controversy, it may be treated as a motion to dismiss for failure to state a claim for relief, and if matters outside the pleadings are admitted by the court, the motion may be treated as one for summary judgment.

5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1360, at 436 (1990). *See also Pfizer*, 812 F.Supp. at 1357-58. Therefore, the motions to dismiss,

along with the motion for summary judgment, will all be treated as motions for summary judgment. However, since all parties concede that there are no genuine issues of material fact, this case essentially becomes a question of statutory interpretation. The Court will now address the legal issues which are in dispute.

IV. DISCUSSION

A. STANDING

The question of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). In order to meet the standing requirement, the plaintiff must satisfy the requirements of Article III as well as prudential considerations that have evolved from judicial precedent. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 471, 102 S.Ct. 752, 757-758, 70 L.Ed.2d 700 (1982).

The constitutional standing requirement has three elements. The plaintiff must show: (1) that it "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"; (2) that the injury is fairly traceable to the challenged action; and (3) that it "is likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758 (citations omitted). First, it is undisputed that UPS is a competitor of the Postal Service and that UPS has authority to compete in the international parcel delivery market. 39 CFR § 320.6 (1993). Second, the Postal Service by its own admission has enacted the ICM agreements with the

intent to pull business away from UPS and other international delivery services.[2] As a result of the Postal Service's actions, UPS could lose substantial business in the international postal market. Plaintiff has established that the new ICM service will cause a direct, imminent injury by eroding UPS' client base. Plaintiff has met the causation test, because it is clear that any harm would be attributable to the fact that former UPS customers are now engaging in the ICM service agreements with the Postal Service. Finally, if the Court were to enjoin the ICM agreements, the harm suffered by UPS would be extinguished. Thus, plaintiff has met the constitutional standing requirement.

In order to satisfy the prudential standing requirement: (1) "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"; and (2) "the plaintiff's complaint [must] fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge*, 454 U.S. at 474-75, 102 S.Ct. at 760. First, UPS has a legally protected right to compete in the international parcel delivery market pursuant to 39 C.F.R. § 320.6. The plaintiff is asserting that its legal right to compete is being harmed by the ICM agreements which the Postal Service

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[2] ICM is designed "to attract customers that currently use competitors and would not otherwise use the Postal Service for their international mailings. If the Postal Service is successful, the additional volume will come from competitors, not from the Postal Service's other international services." 58 Fed.Reg. 29778, 29780 (1993).

admits are intended to attract customers from its competitors such as UPS. Second, as the Supreme Court has explained, the "zone of interests" test is not meant to be especially demanding and there does not have to be an indication that Congress, in enacting the PRA, intended to benefit the would-be plaintiff. *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987). It is unclear who would have standing to challenge the ICM agreements, if not a competitor. Certainly, a mailer who is able to get a better deal from the Postal Service than from UPS would not challenge the ICM agreements. Additionally, the Postal Service concedes that, "[a]s a competitor of the Postal Service in international mail, UPS has standing to complain of allegedly unlawful rates only to the extent that it is harmed as a competitor." (D.I. 18 at 14.) Therefore, the Court concludes that UPS possesses the requisite standing to bring and maintain this lawsuit.

B. LACK OF AUTHORITY UNDER THE PRA TO ENTER INTO ICM

UPS argues that the ICM agreements violate: (1) sections 403(b)(2) and 407 of the PRA because the Postal Service is required to establish international rates for types of service and for categories of mail and mail users; (2) section 403(c) of the PRA which prohibits the Postal Service from unreasonably discriminating among mailers; and (3) section 101(d) of the PRA because the Postal Service is required to establish rates which apportion the cost of postal operations to all users of mail on a fair and equitable basis.

First, § 403(b)(2) refers to the establishing of *categories* of mail and mail users. Plaintiff argues that since each of the ICM agreements is individually negotiated, the Postal Service has thus failed to set up ascertainable categories which apply to all similarly-situated mailers. Defendant contends that, in fact, each of the individually negotiated agreements is a separate category in and of itself. However, defendant's interpretation of the statute makes the term "category" meaningless. If the Postal Service can establish a new category of mail with each and every one of its customers via a separate ICM agreement, then it is effectively creating individually negotiated rates. It is by no means clear that Congress intended to give the Postal Service the broad-ranging authority that it claims to have in the international rate-making area. The Court finds that the individually negotiated rates thus violate the requirement that mail service meet the needs of different categories of mail and mail users. For this reason, the ICM agreements must be enjoined.

Second, § 403(c) on its face prohibits undue or unreasonable discrimination among users of mail. The Postal Service concedes that the nondiscrimination policies in § 403(c) are applicable to international mail service under § 407. (D.I. 39 at 12.) In order to qualify for an ICM agreement, a customer must be *capable* of tendering either one million pounds of international mail or two million dollars' worth of international postage. Since the mailer who enters into an ICM agreement does not actually have to tender the requested amount, but only be capable of doing so, then a large-volume company will be allowed

to engage in ICM agreements, and a small-volume company will not, even if they both wind up tendering the same amount of mail or postage at the end of the year. Unreasonable discrimination occurs when a large-volume company gets a cheaper rate via an ICM agreement, even though it tenders the same amount or even less mail than a small-volume company. The smaller company cannot gain the benefits of ICM service because it fails to meet the threshold capability requirements of ICM service. Seemingly, there is no reasonable explanation as to why the Postal Service uses capability as a criteria rather than actual performance. The Court finds that the ICM agreements are in violation of § 403(c) and thus must be enjoined.

Third, § 101(d) requires the Postal Service to apportion the costs of its services on a fair and equitable basis. Under the ICM system, small-volume mailers who are not able to meet the threshold capacity requirements of the ICM agreements are not able to gain the benefit of an individually-negotiated, lower rate. The costs are not apportioned fairly, because under the ICM, there is no requirement that the large-volume mailer actually deliver more mail than the small-volume mailer. Thus, the usual justification offered for charging less for a greater volume would not apply in this situation. The Court recognizes that there are some cost-savings on the part of the Postal Service when it deals with large-volume mailers. Therefore, it would not be contrary to the PRA for the Postal Service to offer a cheaper rate to a customer who delivers large quantities of mail. However, in a situation where the customer gets a cheaper rate, but does not have to guarantee a certain volume, it will be the small-volume

companies who are left to subsidize the large-volume companies. Since ICM has the potential to apportion the costs of postal operations in an unfair manner, it violates § 101(d) of the PRA.

C. PRESIDENTIAL AUTHORITY IS NEEDED FOR ICM

Finally, UPS argues that the ICM agreements are contrary to the PRA because the Postal Service has not gained presidential approval as is required by § 407(a): "The Postal Service, ***with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter*** conveyed between the United States and other countries." 39 U.S.C. § 407 (1980) (emphasis supplied). The Postal Service concedes that the President has not consented, but argues that the placement of the comma after the word "conventions" indicates that Congress did not intend for the presidential consent requirement to apply to the second clause of that sentence pertaining to the setting of rates of postage. The Postal Service insists that if presidential consent were required, then the comma would not be present in the statute.

A look at the origin and history of this act is instructive. The precursor to § 407 originated in 1851. The 1851 statute reads as follows:

> And the Postmaster-General, ***by and with the advice and consent of the President of the United States, shall be, and he hereby is, authorized to reduce or enlarge, from time to time, the***

> ***rates of postage*** upon all letters and other mailable matter conveyed between the United States and any foreign country.

Act of March 3, 1851, ch. 20, § 2, 9 Stat. 587, 589 (1851) (emphasis supplied).

Thus, it is clear that the Post Office had authority to change the rates of postage only with the consent of the President. In 1872, a new provision was added to the statute which then read: "[T]he Postmaster-General, ***by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage*** on mail-matter conveyed between the United States and foreign countries." Act of June 8, 1872, ch. 335, § 167, 17 Stat. 283, 304 (1872) (emphasis supplied). The only change which occurred in the 1872 statute was that the Postmaster General could then also negotiate and conclude postal treaties and conventions as well as reduce or increase the rates of postage. However, in both situations, the advice and consent of the President was required. The mere creation of additional authority to negotiate postal conventions with the consent of the President cannot be read to eliminate the preexisting requirement of presidential consent for changes in international postal rates. Rather, in the 1872 statute, Congress continued the requirement that the Postmaster General obtain presidential consent in order to change international postal rates while in that same section granted the Postmaster General the additional authority to conclude postal conventions with the consent of the President.

Finally, in 1970, the statute was changed to its present form – § 407(a). The statute remained virtually

unchanged, but now provided that the Postmaster General could establish rates as opposed to simply increasing or decreasing them. Presidential consent was still required and there is no indication in either the 1872 Act or the 1970 statute that Congress intended to give the Postmaster General the authority to change or set rates without presidential approval.

After tracing the history of the Act, it becomes clear that presidential consent was always required. The only change in the statute was an additional provision which allowed the Postmaster General the authority to negotiate and conclude postal treaties and conventions, also subject to presidential consent.

The Postal Service also contends that it would be redundant for the President to approve a rate after it has already been adopted in a postal convention. This much is true. While the Postmaster General may have implemented the rates set in the conventions without further presidential approval, the Postmaster General did so only once the convention was ratified by the President. Obviously, when the President approves a convention which contains international postal rates, he, of necessity, consents to those rates. For the reasons stated above, the Court finds that presidential consent is required under § 407 when the Postal Service makes new, international postal rates.[3]

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[3] An additional reason for requiring presidential consent is the fact that the setting of international rates involves issues of foreign policy. Since the setting of international rates could potentially affect the relations of the United States with other countries, it is inconceivable that Congress would allow the

D. MOTION TO INTERVENE

A party may permissively intervene pursuant to Fed.R.Civ.P. 24(b)(2)[4] if: (1) the application is timely; (2) the applicant's claim and the main action have a question of law or fact in common; and (3) the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. *Brody By and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1115-16 (3d Cir.1992).

When determining whether the motion was timely, the Court should consider three factors: (1) how far the proceedings have progressed when the applicant seeks to intervene; (2) the prejudice to the other parties which results from the delay; and (3) the reason for the delay. *Karr v. Castle*, 768 F.Supp. 1087, 1091 (D.Del.1991). In the case at bar, the motion to intervene was filed less than three months after the suit was initiated by UPS, less than one month after the Postal Service filed its motion to dismiss, and before any discovery had commenced. In *Chiles v. Thornburgh*, the Court held that a motion to intervene was timely where the motion was filed seven

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Postal Service to have such free reign to set international postal rates.

[4] Fed.R.Civ.P. 24(b) states in relevant part:

> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed.R.Civ.P. 24.

months after the complaint and three months after the defendant filed its motion to dismiss. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir.1989); *See also Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 380 (D.Del.1990) (motion to intervene held to be timely where it was filed well before the close of discovery); *Jet Traders Inv. Corp. v. Tekair, Ltd.*, 89 F.R.D. 560, 568 (D.Del.1981) (although there was no good reason for an eight-month delay between the completion of pleadings and the filing of the motion to intervene, "where discovery has not been completed, [where] there have been no significant decisions on the merits considered or decided, and the parties could not be prejudiced by that delay, the motion must be considered timely"). The Court further considers the fact that the Postal Service has not challenged the timeliness of the motion to intervene. The Court finds that the three-month delay will not prejudice any of the parties in the suit and thus holds that the motion to intervene is timely.

Next, the Court must consider whether there is a question of law or fact in common. In May, 1993, the Postal Service adopted the International Customized Mail Rule, which is being challenged as a violation of the PRA. Air Courier is the trade association of the expedited delivery industry and alleges that it has been and continues to be harmed by this Postal Rule. (D.I. 19 at 3, 12.) Thus, ACCA has asserted a legal interest which is clearly related, if not identical, to the main action.

Finally, as to prejudice or delay, the Court notes that allowing ACCA to intervene will not expand the issues currently being litigated. The Court is unaware of any circumstances, nor has the Postal Service in its opposition

to intervention raised any argument, which would suggest that prejudice or delay would result from allowing ACCA to permissively intervene. For these reasons, the Court will grant ACCA's motion for permissive intervention.[5]

V. CONCLUSION

This Court holds that UPS has the requisite standing necessary to challenge the Postal Service's new ICM agreements. Further, the Court finds that the ICM Service violates various sections of the PRA because: (1) it fails to establish categories of mail and mail users; (2) it unreasonably discriminates among users of the mail; and/or (3) it fails to apportion the costs of postal operations on a fair and equitable basis. Alternatively, the Court holds that the ICM agreements violate the PRA because they fail to have presidential approval as is required by § 407 of the PRA. As such, an injunction will be issued forthwith prohibiting the Postal Service from further engaging

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[5] As the proposed intervenors have noted in their briefs, the Postal Service has not challenged ACCA's motion to intervene on the grounds that ACCA has failed to satisfy the required elements of Rule 24, but rather on the theory that ACCA lacks standing to intervene. The Court has not addressed whether ACCA possesses the requisite standing necessary to have initiated the lawsuit originally. This discussion is not necessary in light of the Court's determination that UPS has standing to challenge the postal regulations and that ACCA satisfies the requirements of permissive intervention. *See Indian Recovery Co. v. The China*, 108 F.R.D. 383, 386 (D.Del.1985) (noting that "[a]n intervenor need not have standing necessary to have initiated the lawsuit").

in any ICM arrangements. Finally, the Court grants ACCA's motion to intervene as a permissive intervenor.

RULES and REGULATIONS

POSTAL SERVICE

39 CFR Part 20

International Customized Mail Service

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service, after considering the comments submitted in response to its request in 57 FR 30651 for comments on interim regulations implementing International Customized Mail (ICM) service, hereby gives notice that it is adopting the interim regulations on a permanent basis.

EFFECTIVE DATE: 12:01 a.m., May 21, 1993.

FOR FURTHER INFORMATION CONTACT:

Mr. Rainer K. Hengst, (202) 268-6095, or Mr. John F. Alepa, (202) 268-2650.

SUPPLEMENTARY INFORMATION: On July 10, 1992, the Postal Service published in the Federal Register a document adopting interim regulations implementing International Customized Mail (ICM) service (57 FR 30651). Under the interim regulations, which are contained in Section 290 of the International Mail Manual (IMM), the Postal Service offers ICM service only to customers satisfying specified minimum-volume and mail-origin qualifying criteria. To qualify for ICM service, a customer must be capable of annually tendering at least one million pounds of international mail or paying at least two million dollars in international postage to the

Postal Service, and of tendering all of its mail to the Postal Service from a single location.

Both the Postal Service's existing customers and customers of other services providers can qualify for ICM service. The particular service features and postage rate applicable to an individual qualifying mailer are determined through negotiation between the Postal Service and the mailer and set forth in a service agreement. IMM 290 is designed to provide the Postal Service with the ability to provide customer-specific service offerings at rates that comply with all of the statutory requirements that apply to international postal rates.

The Postal Service requested comments on the interim regulations by August 10, 1992. The six comments received by that date were submitted by a large delivery company, a trade association of the Postal Service's competitors in the expedited delivery services industry, a letter shop, a sponsor of seminars in foreign countries, a foreign postal administration, and a large publisher. The delivery company and the trade association objected to the interim regulations for a number of reasons, most notably on the ground that the Postal Service is not authorized to negotiate rates with individual mailers. In contrast, the other four commenters expressed support for the new service, although the letter shop requested that the qualifying criteria be relaxed.

In reviewing the interim regulations, the Postal Service has carefully considered each of the comments received and has also taken into account its experience to date in providing ICM service. Based on that review, the Postal Service has decided to implement IMM 290 on a

permanent basis. (This final rule represents the current text of IMM 290. The numbering of the July 10, 1992 (57 FR 30651) interim rule text has been changed to conform with the numbering of current IMM 290. Section 290.32 of the interim rule is 293.k of the final rule).

I. The Postal Service's Authority to Offer ICM Service

As noted above, two of the commenters claimed that the Postal Service is not authorized to offer ICM service. The delivery company asserted that the Postal Reorganization Act (Act), 39 U.S.C. 101-5605, does not permit the Postal Service to set rates by entering into agreements with customers. According to this commenter, the Postal Service is authorized only to set rates for categories of mail users. The trade association, on the other hand, asserted that ICM service is unlawful because no provision of the Act expressly authorizes the Postal Service to negotiate rates with individual mailers. After giving these claims due consideration, the Postal Service concludes that it is authorized to offer ICM service.

Section 401(3) of the Act authorizes the Postal Service "to enter into and perform contracts." Although the Act contains some express limitations on the authority to enter into contracts, e.g., 39 U.S.C. 5402(a), no statutory provision prohibits the Postal Service from entering into contracts with its customers or prevents such contracts from specifying rates and services. Indeed, service agreements for domestic Express Mail Custom Designed service have been available for many years. Domestic Mail Manual 223; Domestic Mail Classification Schedule 500.021 (Appendix to 39 CFR part 3001, subpart C).

That the Postal Service has the authority to negotiate rates for international mail with individual customers is also demonstrated by the plain language of Section 407(a) of the Act, which authorizes the Postal Service to "establish rates of postage or other charges on mail matter conveyed between the United States and other countries." The Act imposes certain requirements on all Postal Service ratemaking, domestic and international.[1] However, there is no statutory provision prohibiting international rates that meet those requirements from being established through agreement between the Postal Service and one or more of its customers.

In addition to the express grants of authority set forth in Sections 401(3) and 407(a), the Act gives the Postal Service "all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers." 39 U.S.C. 401(10). That some particular action is not expressly provided for in the statute does not mean that such an action is unauthorized. If an action is incidental, necessary, or appropriate to carrying out the Postal Service's mission and is not otherwise prohibited or limited by the statute, it is authorized by Section 401(10). The July 10 Federal Register notice establishing ICM service on an interim basis explained cogently why rate and service agreements are necessary and appropriate for the Postal Service to carry out its mission. Consequently, authority to offer ICM service is additionally provided by Section 401(10).

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[1] For instance, under Section 403(c), rates must not be unduly or unreasonably discriminatory or preferential.

The Postal Service's negotiating rates with individual mailers is also sanctioned by the Universal Postal Union (UPU), the United Nations specialized agency governing international mail. While charges for mail to member countries of the UPU must be authorized by the Universal Postal Convention (UPU Convention),[2] article 20, paragraph 15 of the UPU Convention authorizes reduced rates for large customers:

Postal administrations may allow reduced charges based on their internal legislation for letter-post items posted in their country. They may, for instance, give preferential rates to major users of the Post. Such preferential rates may not, however, be lower than those applied in the internal service to items presenting the same characteristics (category, quantity, handling time, etc).

In sum, the plain words of both the Act and the UPU Convention authorize negotiated rate agreements under proper conditions.

In addition to claiming that the Postal Service lacks the authority to offer ICM service, the two commenters asserted that any rate implemented pursuant to IMM 290 would be unlawful because all international rates must be either (1) reviewed by the Postal Rate Commission, or (2) approved by the President. This assertion, too, is unfounded.

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[2] "No postal charge of any kind may be collected other than those provided for in the Convention and Agreements." UPU Convention, art. 8.2 (Washington 1989).

The issue of whether the Postal Service is required to submit international rates to the Rate Commission was recently litigated in *Air Courier Conference of America v. U.S. Postal Service*, 959 F.2d 1213 (3d Cir. 1992). In that case, the court unanimously concluded that the Rate Commission does not have jurisdiction over international rates. Looking to the plain language of the Act, the court concluded that the Postal Service's Section 407 authority to "establish the rates of postage or other charges on mail matter conveyed between the United States and other countries" comes within the express exception to Section 3621 of the Act. That exception states that "except as otherwise provided, the Governors [of the Postal Service] are authorized to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of (chapter 36 of the Act)." 959 F.2d 1221.

Whether international rates must be approved by the President is an issue that has never been formally raised. One of the commenters simply asserted, without supporting reasoning, that international rates must be approved by the President. The other commenter asserted that the Postal Service is merely authorized to institute international rates that it has negotiated with foreign governments when those rates are contained in a postal convention that has been approved by the President. These assertions are at odds with the way in which international postage rates have been established for the past 70 years.

It is true that when specific rates are contained in a postal convention, the Postal Service has no discretion to establish other rates. When a convention contains specific

rates, there is no opportunity for the Postal Service to establish any rates as the convention has done that already. It is for those instances where a convention does not establish international rates that the Postal Service is given authority to establish them. These can include instances where a convention either sets maximum or minimum rates or authorizes a charge without indicating its magnitude. They can also include instances where there is no convention in force between the United States and the country with which mail is being exchanged, as is now the case with Taiwan, South Africa, and many of the republics of the former Soviet Union and Yugoslavia. Since the 1920s, when discretion in setting rates was introduced into the UPU Convention, there has been no instance where international rates have been submitted to the President for approval.

This practice is consistent with the plain language of Section 407(a) of the Act, which provides in pertinent part:

The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish rates of postage or other charges on mail matter conveyed between the United States and other countries.

This section grants the Postal Service two very different powers. First, the Postal Service is authorized to negotiate and to conclude postal treaties or conventions. Second, the Postal Service is authorized to establish international rates. As can be seen, a comma separates the clause pertaining to treaties or conventions from the clause pertaining to establishment of rates. If the phrase

"with the consent of the President" were intended to apply to both of these clauses, no comma would have been required. Indeed, if the phrase "with the consent of the President" were intended to apply to both the treaties or conventions clause and the rate establishment clause, insertion of a comma would have been improper.

Moreover, there is a qualitative difference between the two authorizations that warrants the interpretation that the phrase "with the consent of the President" applies only to the treaties-or-conventions clause. When the Postal Service concludes a postal treaty or convention, it does not simply bind itself. A treaty or convention is entered into on behalf of the United States Government and is binding on the United States Government under international law. Because the Postal Service is acting on behalf of the United States, it makes sense that it should obtain the consent of the President, who is generally charged with directing foreign affairs. In contrast, establishing postage rates does not bind the United States Government. There is no reason for the President to be involved.

No sound reason has been given for the Postal Service to change its and the former Post Office Department's longstanding interpretation of the law as not requiring Presidential approval of international rates. Accordingly, the Postal Service concludes that it is not required to submit ICM rates to the President for approval.

The two commenters also contended that the Postal Service must comply with the Administrative Procedure Act (APA) in establishing international rates. The Postal

Service does not agree. Section 410(a) of the Act provides, in pertinent part:

> Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

This section exempts the Postal Service from the APA except as otherwise provided. The exceptions are listed in Section 410(b), which makes sections 552, 552a, and 552b applicable, and 3001(f), which makes chapters 5 and 7 applicable to proceedings under chapter 30 concerning mailability and false representations. Nowhere does the Act mention that the APA applies to international rate-making. Accordingly, the APA does not apply. See *National Easter Seal Society v. Postal Service*, 656 F.2d 754 (DC Cir. 1981).

II. IMM 290's Qualifying Criteria

The Postal Service offers ICM service only to a customer satisfying both the minimum-volume and mail-origin qualifying criteria set forth in IMM 290. First, the customer must be capable, on an annualized basis, of either (1) tendering at least one million pounds of international mail to the Postal Service, or (2) paying at least two million dollars in international postage to the Postal

Service. Second, the customer must be capable of tendering all of its ICM mail to the Postal Service from a single location.

Two commenters objected to the interim regulations' qualifying criteria. The delivery company claimed that the criteria mean that lower rates will be "extended to a mailer based solely on the identity of the mailer and not on the basis of actually realized cost savings." In contrast, the letter shop, while expressing support for ICM service, argued that IMM 290's qualifying criteria are too strict. After giving these claims due consideration, the Postal Service concludes that the qualifying criteria should not be changed.

The delivery company's critique of the qualifying criteria came in the context of a general attack on the ICM program. This commenter asserted that the program will benefit only those mailers that use ICM service. According to this commenter, if the Postal Service negotiates ICM rates with mailers of relatively low-cost items, mailers of relatively high-cost items will be the only mailers left paying published rates. As the average cost for non-ICM mail will thereby increase, this commenter continued, the Postal Service will be forced either to accept a lower contribution to fixed costs or to increase published rates.[3] The delivery company objected to IMM

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[3] The delivery company's comments in this regard read as follows:

The uniform international rates currently in effect are based on a mix of volume which contains both relatively higher cost mail and relatively lower cost mail. If the Postal Service negotiates lower rates with individual mailers who tender allegedly

290's qualifying criteria on the ground that they exacerbate this situation by making ICM rates available to mailers capable of providing the Postal Service with cost savings regardless of whether the Postal Service actually realizes such cost savings.

The delivery company's remarks misrepresent both how the ICM program affects non-ICM customers and the purpose of the qualifying criteria. As explained in the July 10 Federal Register notice, the Postal Service has found it increasingly difficult to compete effectively against other providers of international hard copy communications and parcel delivery services. IMM 290 is intended to provide the Postal Service with the pricing flexibility necessary to attract new business customers and to keep existing business customers at rates that accurately reflect the Postal Service's costs of delivering the customer-specific mail volumes.

Notwithstanding the scenario painted by the delivery company, the ICM program should not cause any customers to pay higher rates than they would without the

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lower cost mailings, the unit revenue generated from those mailers will of course decrease. But the cost of those mailings on which the current uniform rates are based will not decrease. Instead, the average cost for non-contract mail will increase. However, there will be no increase in unit revenue from allegedly higher cost mailers to make up for the lower contract rates since the non-contract rates paid by higher cost mailers will not change. Under these circumstance, the contribution to fixed costs will decrease. On the other hand, if the uniform rates available to mailers who cannot avail themselves of negotiated rates are increased, then the Postal Service's justification that individually negotiated rates will benefit non-contract mailers as well as contract mailers will not be the case.

program. First, there is no reason to believe that the program will result in the cannibalization of the Postal Service's other international services. As this commenter itself recognizes, in addition to serving existing customers better, the Postal Service is trying to attract customers that currently use its competitors and would not otherwise use the Postal Service for their international mailings. If the Postal Service is successful, the additional volume will come from competitors, not from the Postal Service's other international services. Consequently, there is no basis for the delivery company's assertion that the average cost for non-ICM mail will increase.

Indeed, rather than harming customers that use the Postal Service's other services, the ICM program benefits them by decreasing the total revenues that the Postal Service needs to recover from them. As stated in the July 10 Federal Register notice, the Postal Service will not enter into an ICM service agreement unless it reasonably believes at the time that the rates will generate revenues greater than costs. The ICM program thus makes all of the Postal Service's customers better off because the additional business generated not only covers the extra variable costs it causes, but also enables the Postal Service to recover its fixed costs from a larger base of customers. This is true regardless of how the unit revenue realized from ICM customers compares to the unit revenue realized from non-ICM customers.

The delivery company's objection to IMM 290's qualifying criteria also does not stand up to scrutiny. The delivery company asserted that the criteria are too loose because a customer can qualify for ICM service merely by

being capable of tendering a large volume of international mail from a single location, regardless of whether the customer actually does so. Instead, according to this commenter, the criteria should allow a customer to qualify only when the Postal Service actually realizes cost savings from delivering the customer's mail.

The delivery company's objection is based on two premises. First, this commenter is of the view that the Postal Service can offer ICM service only when it can realize cost savings. Second, this commenter believes that the proper function for IMM 290's qualifying criteria to perform is to distinguish between mailers of relatively low-cost items and mailers of relatively high- cost items. Neither of those premises is correct.

The Postal Service's authority to negotiate international rates is circumscribed only by the statutory requirements applicable to all Postal Service ratemaking. As long as it complies with those requirements, the Postal Service's ability to compete for customers is similar to that enjoyed by other providers of international hard copy communications and parcel delivery services. This means that the Postal Service can exercise a significant amount of discretion when choosing to which customers it will offer ICM service. For now, the Postal Service has decided that customers of a certain size represent the most promising market.

As discussed in detail in the July 10 **Federal Register** notice, IMM 290's qualifying criteria were selected in order to maximize the beneficial effects of flexible pricing. Requiring an ICM user to be capable of generating a substantial amount of international mail allows the Postal

Service to focus its marketing efforts on the large business customers that collectively make up the most competitive market for international hard copy communications and parcel delivery services. Requiring an ICM user to be capable of concentrating all of its international mail at a single origin similarly makes flexible pricing more cost-effective by improving the Postal Service's ability accurately to determine costs on an individualized, rather than aggregated, basis.

The qualifying criteria also serve to limit the universe of potential ICM users to a manageable size. Nevertheless, once a customer demonstrates that it can satisfy the qualifying criteria, the Postal Service is obliged to make ICM service available to the customer. Of course, given the highly competitive nature of this industry, the Postal Service may be unable or unwilling to offer the customer a rate that is low enough to induce it to enter into an ICM service agreement. For instance, the Postal Service's anticipated costs to deliver the customer's mail may be relatively high due to the destination countries or type of mail involved.

Although the opportunity to realize cost savings may influence the rate that the Postal Service offers a particular customer, it is not dispositive of the issue of whether that customer should qualify for ICM service in the first place. The delivery company does not appear to recognize this. Consequently, its assertion that IMM 290's qualifying criteria should focus on cost savings is misplaced.

In contrast to the delivery company, the letter shop took the position that IMM 290's qualifying criteria are too strict. This commenter explained that it does not

currently generate enough international mail to qualify for ICM service, even through [sic] it has the production and transportation capabilities necessary to meet the one-million-pounds-or-two-million-dollars threshold. According to this commenter, its inability to qualify places it at a competitive disadvantage to letter shops that can meet the threshold: qualifying letter shops are able to charge their competitors discounted postage rates that they have negotiated with the Postal Service, while the commenter has no choice but to charge published rates.

In order to solve this alleged problem, the letter shop recommended that the Postal Service make three changes to IMM 290's qualifying criteria. First, this commenter suggested that the Postal Service apply the threshold to the customer's combined domestic, international, and foreign mail volume, rather than simply to the customer's international mail volume. Second, this commenter suggested that the Postal Service replace the one-million-pounds-or- two-million-dollars threshold with a one-million-pieces threshold. Third, the letter shop suggested that the Postal Service waive the qualifying criteria for a customer performing worksharing that reduces the Postal Service's costs to deliver the customer's international mail and/or enhances the marketability of the Postal Service's international products.[4]

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[4] As an illustration of customer worksharing that would enhance the marketability of the Postal Service's products, the letter shop offered the example of mailers that are able to containerize their mail and then deliver it directly to the air carriers' facilities. According to the letter shop, the improved speed of delivery made possible by the mailers' worksharing would make the Postal Service's international services more attractive to other potential customers.

The Postal Service notes that each of these changes would significantly relax IMM 290's qualifying criteria. As discussed in the July 10 **Federal Register** notice, the Postal Service recognized that it had to impose some size-related criterion on ICM eligibility. The Postal Service determined that a one-million-pounds-or-two-million-dollars threshold provided the proper balance between the Postal Service's need to be able to focus its marketing efforts in a cost-effective manner and its desire to offer ICM service to a wide range of customers. Based on its experience to date in operating the ICM program, the Postal Service believes that IMM 290's qualifying criteria have served the intended purpose and, therefore, should not be changed.

The Postal Service also is unwilling to relax the qualifying criteria because the premise underlying the letter shop's comments – that the one-million-pounds- or-two-million-dollars threshold will enable its larger competitors to corner the market – is misplaced. This commenter apparently misunderstands the function of the qualifying criteria. Offering ICM service is intended to improve the Postal Service's ability to compete for large business customers. However, whether or not a particular customer qualifies for the service depends on the characteristics of that customer's international mail, not on that customer's size. Even a relatively small customer can qualify if it becomes capable of tendering a sufficient amount of international mail to the Postal Service.

ICM service is available only to a customer that is capable of meeting the threshold with actual, rather than speculative, international mail. Therefore, how the qualifying criteria apply depends in large part on the source of

the mail in question. In the case of a customer that originates international mail, such as a publisher or a mail order company, there are two ways for the customer to demonstrate its ability to satisfy the threshold. First, the customer can provide the Postal Service with historical data relating to the customer's international mailings during the previous year. Alternatively, the customer can provide the Postal Service with reliable information about the customer's planned international mailings during the upcoming year. In both instances, the customer possesses the information necessary for the Postal Service accurately to determine the costs of delivering the customer's mail. As the customer itself will be executing the ICM service agreement, whether the customer arranges for the delivery of its mail directly through the Postal Service or through an agent is immaterial.

In contrast, it is much more difficult for a customer that acts as a mailing agent but does not originate its own international mail, such as a consolidator or a letter shop, to qualify for ICM service. As an agent, the customer has little or no control over the size, shape, weight, destination, or other characteristics of the mail that it receives from its clientele and for which it arranges delivery. As a result, the customer in all likelihood does not possess the information necessary for the Postal Service accurately to determine the costs of delivering such mail. In light of that deficiency, the customer can demonstrate its ability to satisfy the one-million-pounds-or-two- million-dollars threshold only by providing the Postal Service with reliable information about the international mail that the customer is assured of receiving from its clientele during the upcoming year. For example, if the customer has

executed delivery contracts with publishers that collectively originate enough international mail to satisfy the threshold, the customer can provide the Postal Service with copies of those contracts along with related data obtained from the publishers.

As the above discussion makes clear, there is no reason for the letter shop commenter to fear being placed at a competitive disadvantage by IMM 290's qualifying criteria. Whether a particular letter shop qualifies for ICM service is not a function of current size. Rather, a letter shop must be in a position to provide adequate guarantees of both the amount and the characteristics of the international mail that it will be tendering to the Postal Service. This commenter's ability to attract the new business necessary for it to qualify is no different from its larger competitors. Therefore, except to the extent that they receive international mail from its originators pursuant to contracts not due to expire for at least a year, this commenter's larger competitors have no advantage when it comes to qualifying for ICM service.

III. Other Comments

The trade association and the delivery company attacked the ICM program on several other grounds in addition to those discussed above. The trade association claimed that IMM 290 does not specify any pricing or costing guidelines, and that the July 10 **Federal Register** notice did not define the cost coverage goal for ICM. Based on those purported shortcomings, this commenter asserted that "the notice raises the specter that the pricing of ICM services will be below cost, predatory and

fueled by subsidies from the domestic first class monopoly." This commenter also asserted that interested parties will have to engage in "piecemeal litigation" in order to prevent the Postal Service from violating its "statutory pricing strictures."

The delivery company, on the other hand, attacked the ICM program on the ground that "[t]he negotiation of customer-specific rates readily leads to rate discrimination, which is prohibited by Section 403(c) of the [Act]." This commenter contended that the only way that the Postal Service can avoid discrimination is to make all rates universally available to all mailers.

The Postal Service believes that these attacks are unwarranted. The Postal Service has designed the ICM program to ensure that the rates negotiated with customers comply with all of the statutory requirements that apply to international postal rates.

As noted above, the Postal Service stated in the July 10 **Federal Register** notice that it will not enter into an ICM service agreement unless it reasonably believes at the time that the rates will generate revenues greater than costs. The Postal Service also has explicitly recognized its responsibility under Section 403(c) to ensure that ICM rates are not unduly or unreasonably discriminatory or preferential. As stated in the July 10 notice, the Postal Service will make every ICM service agreement available to similarly situated customers under substantially similar circumstances and conditions. Therefore, contrary to these two commenters' assertions, the ICM program does not represent a means for the Postal Service to attempt to

avoid statutory requirements. ICM rates are no different from other international rates in this regard.

Since the Postal Rate Commission does not have jurisdiction over international rates, the Postal Service's competitors cannot challenge ICM or any other international rates in that forum. However, the Postal Service's competitors can seek judicial review of ICM rates just like they can seek judicial review of other international rates. Consequently, the Postal Service fails to understand the trade association's assertion that the ICM program is flawed because the Postal Service's competitors will have to resort to litigation in order to challenge ICM rates.

In contrast to the trade association and the delivery company, the other four commenters expressed support for the ICM program. The foreign postal administration asserted that IMM 290 "will give [the Postal Service] the tools to deal with a highly competitive environment." The seminar sponsor and the letter shop both noted that they would welcome the opportunity to negotiate rates based on identifiable cost savings, while the letter shop added that it would also like to negotiate rates based on increased national volume. Finally, the publisher strongly endorsed the program: "By focusing on the long-term, total contribution an individual mailer can make toward the Postal Service's fixed institutional costs, these new regulations [IMM 290] correctly highlight customer responsiveness and provide overdue incentives to retain and grow overall mail volume. . . . We regard the establishment of ICM service as a watershed event for the Postal Service."

The support for the ICM program expressed by these four commenters and by other international mailers that have contacted the Postal Service since it implemented the program indicate that customers view ICM service as a long- awaited and valuable addition to the Postal Service's WORLDPOST product line.

IV. Conclusion

In setting international postage rates, the Postal Service must ensure that such rates (1) do not apportion the costs of the service so as to impair the overall value of the service to the users; (2) apportion the costs of all postal operations to all users on a fair and equitable basis; (3) are fair and reasonable; and (4) are not unduly or unreasonably discriminatory or preferential. Due to the manner in which they are set, ICM rates will satisfy these criteria.

Accordingly, the Postal Service hereby adopts IMM 290 on a permanent basis. This change shall take effect at 12:01 a.m., on May 21, 1993.

The Postal Service adopts the following amendments to the International Mail Manual, which is incorporated by reference in the Code of Federal Regulations. See 37 CFR 20.1.

List of Subjects in 39 CFR Part 20

International postal service, Foreign relations.

PART 20 – (AMENDED)

1. The authority citation for 39 CFR part 20 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 401, 404, 407, 408.

2. The addition of section 290, as revised below, to Chapter 2 of the International Mail Manual is adopted as final.

CHAPTER 2 – CONDITIONS FOR MAILING

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290 International Customized Mail

291 Description. International Customized Mail (ICM) service is an international business mail service that is available only pursuant to an ICM service agreement between the Postal Service and a mailer meeting the requirements in 292. The Postal Service provides ICM service, on a mailer-specific basis, pursuant to the terms and conditions stipulated in a particular ICM service agreement.

292 Qualifying Mailers. To qualify for ICM service, a mailer must be capable, on an annualized basis, of either (1) tendering at least 1 million pounds of international mail to the Postal Service, or (2) paying at least 2 million dollars in international postage to the Postal Service. The mailer must also be capable of tendering all of its ICM mail to the Postal Service from a single location.

293 ICM Service Agreements.

Each ICM service agreement must set forth the following:

a. The term of the agreement, including any renewal options.

b. The type of mail to be tendered by the mailer.

c. The destination country or countries.

d. The services to be provided by the Postal Service, including any speed-of-delivery targets.

e. Minimum volume commitments for each service.

f. Postage and method of payment.

g. Weight and size limits.

h. Preparation requirements.

i. Makeup requirements.

j. Any other obligations of either party.

k. The location from which the mailer is required to tender its items to the Postal Service.

294 Postal Bulletin Notifications.

Within 30 days of entering into an ICM service agreement, the Postal Service must publish the following information about the agreement in the Postal Bulletin:

a. The term of the agreement, including any renewal options.

b. The type of mail involved.

c. The destination country or countries.

d. A brief description of each of the services to be provided by the Postal Service.

e. Minimum volume commitments for each service.

f. A brief description of any worksharing to be performed by the mailer.

g. The agreed-upon rate for each service at the volume level committed to by the mailer.

* * *

A transmittal letter making the changes in the pages of the International Mail Manual will be published and transmitted to subscribers automatically. Notice of issuance of the transmittal letter will be published in the **Federal Register** as provided by 39 CFR 20.3.

Stanley F. Mires,

Chief Counsel, Legislative.

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